(2)

No. 89-213-CSY
Status: GRANTED

Title: Pennsylvania, Petitioner
v.
Inocencio Muniz

Docketed:
July 10, 1989

Court: Superior Court of Pennsylvania,
Harrisburg Office

Counsel for petitioner: Eakin,J. Michael

Counsel for respondent: Maffett Jr.,Richard F.

Entry	Date	Note	Proceedings and Orders
1	Jul 10 1989	G	Petition for writ of certiorari filed.
2	Sep 5 1989		DISTRIBUTED. September 25, 1989
3	Sep 15 1989	F	Response requested -- BRW.
4	Sep 27 1989		REDISTRIBUTED. October 13, 1989
5	Oct 16 1989		Petition GRANTED.
			**********
6	Nov 30 1989		Brief amicus curiae of United States filed.
7	Nov 30 1989		Record filed.
		*	Certified copy of original record received.
8	Nov 30 1989		Joint appendix filed.
9	Nov 30 1989		Brief of petitioner Pennsylvania filed.
10	Dec 7 1989		Order extending time to file brief of respondent on the merits until January 12, 1990.
11	Dec 14 1989	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
13	Jan 5 1990		SET FOR ARGUMENT TUESDAY, FEBRUARY 27, 1990. (2ND CASE)
12	Jan 8 1990		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
14	Jan 10 1990		Brief of respondent Inocencio Muniz filed.
15	Jan 18 1990		CIRCULATED.
16	Feb 27 1990		ARGUED.

89-213

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA
Petitioner

V.

INOCENCIO MUNIZ,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

J. MICHAEL EAKIN
DISTRICT ATTORNEY
ATTORNEY FOR PETITIONER

CUMBERLAND COUNTY COURTHOUSE
SOUTH HANOVER STREET
CARLISLE, PENNSYLVANIA 17013
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64 pp

QUESTIONS PRESENTED

I. ARE STATEMENTS INCIDENT TO FIELD SOBRIETY TESTING WHICH DEMONSTRATE ONE'S PHYSICAL ABILITY TO SPEAK DEMONSTRATIVE RATHER THAN TESTIMONIAL IN NATURE SUCH THAT MIRANDA WARNINGS NEED NOT BE GIVEN PRIOR TO OBTAINING THEM?

II. IS INSTRUCTIONAL ADVICE GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE?

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PRAYER

Petitioner, the Commonwealth of Pennsylvania, respectfully requests that a Writ of Certiorari issue to review the Judgment and Opinion of the Superior Court of Pennsylvania, authored by President Judge Cirillo, entered in this case on September 8, 1988, review of which was denied by the Pennsylvania Supreme Court by Order dated May 10, 1989.

OPINIONS BELOW AND JURISDICTION

The trial court's Judgment of Sentence is attached hereto as Appendix D. The trial court's Opinion and Order denying defendant's Motion for a New Trial and in Arrest of Judgment is attached hereto as Appendix C.

The Judgment and Opinion of the Superior Court of Pennsylvania, which reversed the decision of the trial court and remanded for proceedings consistent with its Opinion, is reported at ____ Pa Super. _____, 547 A.2d 419 (1988). That Opinion was handed down on September 8, 1988, and is attached hereto as Appendix B. The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allowance of Appeal in an unreported Order dated May 10, 1989, and docketed at No. 249 M.D. Allocatur Docket, 1988. That Order is attached hereto as Appendix A.

The jurisdiction of this Court to review the Judgment and Opinion of the Superior Court of Pennsylvania, Middle District, is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment 5, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a non-jury trial before the Honorable George E. Hoffer on May 20, 1987, the defendant, Inocencio Muniz, was found guilty of driving under the influence in violation of 75 Pa.C.S.A. §3731. Defendant's post-trial motions were denied. Having been previously convicted of driving under the influence in 1985, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Defendant's conviction was reversed by the Superior Court of Pennsylvania in an opinion filed September 8, 1988.

The defendant's conviction stems from an incident which took place on November 30, 1986. In the early morning hours, Officer David Spotts of the Upper Allen Township Police Department noticed the defendant's vehicle, with hazard lights flashing, stopped on the berm of Route 15.

Upon reaching the vehicle and speaking with the defendant, the officer noticed a strong odor of alcohol on the defendant's breath. The defendant's eyes were bloodshot, and his coordination skills were poor.

Believing the defendant was intoxicated, Officer Spotts advised him to remain on the berm until he was sober and not to attempt to drive at that time. The defendant orally agreed to the officer's request, but before the officer had time to return to his own vehicle, the defendant pulled back onto the highway and proceeded to drive away. The defendant was subsequently pulled over by the same officer, who asked for the defendant's license and registration. After producing other documents, the defendant managed to provide the officer with the requested information. The defendant failed several field sobriety tests, was placed under arrest, and was transported to the Central Booking Center.

The Booking Center routinely videotapes defendant who have been arrested for driving under the influence so that a permanent record of their condition will be preserved for trial. In accordance with that policy, the defendant was videotaped answering routine questions and taking sobriety tests. The defendant refused to submit to a breathalyzer test.

In reversing the Judgment of Sentence, the Superior Court applied its rationale in Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987) allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed, Pennsylvania v. Bruder, _____ U.S. _____, 57 U.S.L.W. 3311 (1988) (recitation of the alphabet was communicative in nature); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987) allocatur denied, _____ Pa. _____, 549 A.2d 914 (1988) (defendant's requests for clarification of instructions to field sobriety tests were communicative in nature);

Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280 (1988), allocatur denied, No. E.D. Allocatur Docket 1988 (October 19, 1988) (entire audio portion of videotape should have been suppressed absent valid waiver of Miranda rights). The Superior Court concluded that the entire audio portion of the videotape in this case constituted compelled testimony evidence which was elicited before the defendant received Miranda warnings. Finding the evidence should have been excluded, and that the defendant was prejudiced by its admission, the case was reversed and remanded for a new trial.

The Commonwealth filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. That petition was denied by Order entered May 10, 1989.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE THAT MIRANDA WARNINGS BE GIVEN PRIOR TO OBTAINING STATEMENTS INCIDENT TO FIELD SOBRIETY TESTING WHICH DEMONSTRATE ONE'S PHYSICAL ABILITY TO SPEAK BECAUSE THOSE VOICE EXEMPLARS ARE DEMONSTRATIVE RATHER THAN TESTIMONIAL IN NATURE.

In the instant case, the defendant was videotaped during processing after his arrest for driving under the influence of alcohol. The videotape was part of the routine procedure. As part of processing, the defendant was asked to calculate the date of his sixth birthday, he was asked to count a series of numbers during field sobriety testing, and he was asked if he understood the instructions he was being given. Finally, he was asked if he understood the Implied Consent Law as it related to his right to refuse a

breathalyzer test. The Superior Court of Pennsylvania held that the audio portion of the videotape should have been suppressed because these were testimonial utterances compelled in violation of the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[1]

In reaching its decision in the instant case, the Pennsylvania Superior Court relied on its own rationale in Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280, (1988), allocatur denied, No. 444 E.D. Allocatur Docket 1988 (October 19, 1988); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, _____ Pa. _____, 549 A.2d 914;

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[1] The Court decided that Article I, Section 9 of the Pennsylvania Constitution offers protection identical to that afforded by the Fifth Amendment of the Federal Constitution. Hence, this Court's interpretation of the federal protections controls the outcome of this case. Appendix B at B4.

Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed Pennsylvania v. Bruder, _____ U.S. _____, 57 U.S.L.W. 3311 (1988). The Superior Court decided that the result in the instant case is controlled by its previous conclusions in Bruder and Conway that evidence of a defendant's inability to recite the alphabet and the videotaped evidence of a DUI defendant's conduct are communicative rather than demonstrative evidence. The Superior Court has continued to follow this line of reasoning in subsequent cases. See, Commonwealth v. Peth, 374 Pa. Super. 265, 542 A.2d 1015 (1988), and Commonwealth v. Thompson, _____ Pa. Super. _____, 547 A.2d 1223 (1988).

The Pennsylvania Supreme Court has consistently denied allocatur, refusing to correct the Superior Court's repeated error.

The Superior Court panels have cited no authority for the legal conclusion that asking a person to demonstrate his physical ability to speak is testimonial in nature and thereby encompassed within the protections of the Fifth Amendment. Likewise, the panels have not cited any basis for deviating from the contrary conclusion reached by other state courts who have held that statements incident to physical coordination tests including the recitation of the alphabet or the counting of numbers are not testimonial

evidence within the purview of the Fifth Amendment.[2]

This Court has previously held that the use of a defendant's voice as an identifying physical characteristic for the purpose of evaluating the physical properties of that voice does not violate the defendant's Fifth Amendment rights. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Wade, 388 U.S. 218 (1967).

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[2] Palmer v. State, 604 P.2d 1106 (Alaska 1979); Lanford v. People, 159 Colo. 36, 409 P.2d 829 (1966); Oxholm v. District of Columbia, 464 A.2d 113 (D.C. App. 1983); State v. Mannion, 414 N.W.2d 119 (Iowa 1987) (dictum); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); State v. Breeden, 374 N.W.2d 560 (Minn. Ct. App. 1985); State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977); State v. Bottomly, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), aff'd, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986); Piqua v. Hinger, 15 Ohio St.2d 110, 238 N.E.2d 766, cert. denied, 393 U.S. 1001 (1968); State v. Roadifer, 346 N.W.2d 438 (S.D. 1984); State v. Haefer, 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982); Annot. 41 A.L.R. 812 §16 at 848-55 and cases cited therein. Cf. State v. Palmer, 206 Conn. 40, 536 A.2d 936 (1988); Macias v. State, 515 So.2d 206 (Fla. 1987).

There is nothing substantively incriminating in counting a sequence of numbers or in other conversation incident to the videotaping process.

This case squarely presents the issue recognized but not reached by this Court in Pennsylvania v. Bruder, _____ U.S. _____, _____, n.3 57 U.S.L.W. 311, 311 n.3 (1988) (reversing the Opinion of Cirillo, P.J.) ("We do not reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence admissible under Miranda v. Arizona, 384 U.S. 436 (1966).); and in South Dakota v. Neville, 459 U.S. 553 (1983) concerning "the distinction between real or physical evidence,

on the one hand, and communications or testimony, on the other [hand]....Id, at 561.[3]

A defendant's recitation of identifying information is circumstantial, non-testimonial evidence. As was so cogently expressed by the Honorable Robert S. Gawthrop, III, in his Opinion denying defendant's Post-Trial Motions in Waggoner, if the identifying information was being utilized to prove the truth of that information, then it would be testimonial. However, "when it is merely offered to show the manner of speech, the lack of muscular coordination of tongue and mouth, it is nothing more than the spoken equivalent of the straight line defendants are often commanded to walk, heel-to-toe, during the

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[3] At the time of its decision, the Superior Court of Pennsylvania did not have the benefit of this Court's most recent discussion of the issue in which this Court concluded that "in order to be testimonial, an accused's communication must itself, explicitly or implicity, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. _____, _____, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988) (footnote omitted).

administration of so-called field testing of their muscular coordination of their legs and torso, rather than of their lips and tongue." Opinion of the Court, Commonwealth v. Waggoner, No. 2070-86 Court of Common Pleas, Chester County, Pennsylvania, at p. 7 (June 9, 1987).

In the context of driving under the influence cases, determining the borderline between testimonial and non-testimonial utterances presents an issue of profound public importance worthy of this Court's review. Now that DUI defendants throughout the country are routinely videotaped during processing and sobriety testing, the distinction between voice exemplars and compelled testimonial utterances is a substantial issue; it is also one which has yet to be considered by this Court. This Court's resolution of the issue will have a significant impact on the processing and prosecution of defendant's charged with driving under the influence, and law

enforcement officials are in need of this Court's definitive resolution of the issue. This Court should grant certiorari to resolve the conflict between the Superior Court of Pennsylvania's holding and the overwhelming weight of constitutional authority throughout the country to the contrary.

II. INSTRUCTIONAL ADVICE GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING IS NOT "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE.

In the instant case, the Superior Court of Pennsylvania concluded the audio portion of the defendant's videotaped performance at the Booking Center should have been excluded as evidence because it contained responses and communications elicited from the defendant before he received Miranda warnings. Miranda warnings are not required unless a defendant is subjected to custodial interrogation. Although this defendant was in

custody, he was not subject to interrogation as that term is defined by law.

A defendant's statements are not the product of interrogation unless those statements were made in response to police conduct likely or expected to elicit a confession or other incriminating statement. This court has defined interrogation to encompass "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). On the other hand, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of Miranda [since] police words or actions normally attendant to arrest and custody do not constitute interrogation." South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

Upon arrival at the Booking Center, and prior to being advised of his constitutional rights, the defendant in this case was asked a series of questions including his address, height, weight, color of eyes, date of birth, age and the date of his sixth birthday. Thereafter, defendant was asked to perform several field sobriety tests. During the course of testing, the defendant was asked whether or not he understood the instructions. Finally, prior to his Miranda warnings, defendant was informed of the Implied Consent Law.[4] After making several inquiries about its content, defendant acknowledged he understood it. Thereafter, the defendant stated he recently finished serving a license suspension and did not want his license suspended again.

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[4] Individuals driving on the roadways of Pennsylvania are statutorily deemed to have impliedly consented to undergo chemical testing to determine their blood alcohol content. 75 Pa.C.S. §1547.

Police conversation with the defendant during the initial routine questioning was not interrogation. All of the questions, except the date of his sixth birthday, were to obtain identifying information necessary to book the defendant. The questions were not designed to elicit any substantively incriminating response. Therefore, Miranda warnings were not required. Even the question concerning defendant's sixth birthday was not designed to obtain testimonial evidence. Rather, its purpose was to obtain demonstrative, circumstantial evidence of defendant's physical condition. In other words, the question was not designed to obtain evidence which would be used to prove the truth of the matter asserted, i.e. the date of defendant's sixth birthday, but to demonstrate his inability to calculate that date. The question asked the defendant to demonstrate the physiological functioning of his brain in much the same way as other sobriety tests demonstrated the functioning of

his motor skills. As discussed previously, that type of communication is truly demonstrative rather than testimonial in nature and should not come within the purview of the Fifth Amendment.

During the second phase of the videotaping process, the defendant was asked to perform field sobriety tests. The videotape contains defendant's questions about how to perform the sobriety tests. Police conversation during the testing was merely to instruct defendant concerning performance of the tests and to determine whether the defendant understood the instructions. Again, these questions were not designed to provoke substantively incriminating responses, but, rather, were for the defendant's benefit. The questions kept the booking agents from erroneously concluding the defendant's intoxication prevented him from performing tests when his poor performance was actually the result of his inability to understand the instructions. The propriety of the

questioning in this case is accentuated by the fact that english was defendant's second language. It was, therefore, eminently reasonable for the booking agents to ascertain the defendant's understanding of the instructions. The decision of the court below is in conflict with other state courts which have concluded that similar police conduct does not constitute interrogation.[5]

During the final stage of the videotaping, the defendant was advised of the Implied Consent Law and asked to take a breathalyzer test. After the Implied Consent Law was explained to the defendant, he was asked if he understood the law. After making several inquiries as to its content, he said that he did. Like the conversation during

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[5] Palmer v. State, 604 P.2d 1106 (Alaska 1979); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); People v. Jacquin, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988). Contra, Jones v. State, 745 S.W.2d 94 (Tex. Ct. App. 1988) (Discretionary review granted April 27, 1988) (submitted on briefs October 12, 1988).

sobriety testing, the booking agent's conversation with the defendant during this portion of the processing was not contact calculated to evoke admissions. If the defendant failed to understand the Implied Consent Law, he could not intelligently refuse to submit to the breathalyzer test. It is absurd to think that the police cannot ask a person if he understands the law without violating his Miranda rights. In order to help the defendant realize his rights and obligations, the police must ascertain whether he requires further or repeated instructions. Inasmuch as the booking agent's questions were not calculated to, expected to, or likely to evoke incriminating statements from the defendant, Miranda warnings were not required.

It was error for the Superior Court to conclude the entire audio portion of the videotape should have been suppressed when the defendant's statements were not the product of interrogation. Discretionary review should be granted to provide guidance to law enforcement

personnel as to the relationship of this necessary investigative procedure to the Innis and Neville standards. Moreover, this case is the perfect vehicle for resolution of the issue because the facts are succinct and the issues straightforward.

CONCLUSION

For all the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Petition for Writ of Certiorari be granted as to all questions presented.

Respectfully submitted,

J. Michael Eakin
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Cumberland County Courthouse
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Carlisle, PA 17013
(717) 240-6210

APPENDIX A

Supreme Court of Pennsylvania

Middle District

Mildred E. Williamson
Deputy Prothonotary

434 Main Capitol Building
P.O. Box 624
Harrisburg, Pennsylvania 17108
(717) 787-6181

May 12, 1989

Syndi L. Norris, Esquire
Office of the District Attorney
Cumberland County Courthouse
Hanover Street
Carlisle, PA 17013

Re: Commonwealth, Petitioner
v. Inocencio Muniz
No. 249 M.D. Allocatur Dk. 1988

Dear Counsel:

This is to advise that the following Order has been entered for the above-captioned matter:

ORDER

"May 10, 1989,

Petition Denied

s/Per Curiam."

Very truly yours,
/s/ M. E. Williamson
Mildred E. Williamson
Deputy Prothonotary

MEW/pam

cc: Hon. George E. Hoffer - Cumberland County
Richard F. Maffett, jr., Esquire
Clerk of Courts - Cumberland County
[No. 172 Crim. 1987]

APPENDIX B

J. 57023/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
VS.	:	
INOCENCIO MUNIZ, Appellant	:	No. 00157 Harrisburg 1988

Appeal from the Judgment of Sentence February 2, 1988 in the Court of Common Pleas of Cumberland County, Criminal, No. 172 Criminal 1987.

BEFORE: CIRILLO, P.J. and OLSZEWSKI and MONTEMURO, JJ.

OPINION BY CIRILLO, P.J.:

Filed: September 8, 1988

This is an appeal from a judgment of sentence entered by the Court of Common Pleas of Cumberland County following Inocencio Muniz's conviction for driving under the influence of alcohol. We reverse.

While on routine patrol in the early morning hours of November 30, 1986, Officer David Spotts of the Upper Allen Township Police Department observed a vehicle positioned on the northbound berm of U.S. Route 15. The vehicle was parked with its

engine running, and the driver had activated its emergency flashers. Believing it to be a disabled vehicle, Officer Spotts stopped to offer assistance.

Officer Spotts's investigation revealed two individuals in the front seat of the vehicle, the driver being later identified as Inocencio Muniz. When the patrolman asked if he could be of assistance, Muniz replied that he had merely stopped to urinate. At that point Officer Spotts detected a strong odor of alcohol emanating from Muniz's breath. He also observed that Muniz's eyes were glazed and bloodshot, his face appeared flushed, and he exhibited a rather poor command of his coordination skills. Officer Spotts then directed Muniz and his passenger to remain along the roadside until he was in a condition to operate his vehicle safely. Muniz readily acknowledged this request, and assured the officer that he would remain along the berm until he could drive safely.

As Officer Spotts was returning to his cruiser, he heard Muniz's vehicle start to pull away from the berm of the road and continue along Route 15. The patrolman quickly got back into his cruiser and pursued the errant motorist approximately one-half mile down the road where he activated his warning lights and pulled Muniz over. The officer then requested Muniz's license and registration cards. Muniz fumbled through his wallet, dropping several cards, and eventually gave the police officer his Social Security card and his U.S. Department of Agriculture farm labor card. After a second request, Muniz produced the proper identification. Officer Spotts then asked Muniz to step out of his automobile to perform several field sobriety tests.

Muniz was administered three commonly utilized field sobriety tests: the horizontal gaze nystagmus test, the "walk and turn" test, and finally, the "one leg stand" test. Muniz failed each of these tests.

During the field sobriety tests, Muniz readily admitted that he had been drinking, that he was drunk, and that he could not perform the various tasks required because he was too inebriated. Muniz was then arrested and transported to the West Shore facility of the Cumberland County Central Booking Center for processing. During the course of the processing at the Booking Center, Lisa Deyo, a caseworker at the center explained the Implied Consent Law, 75 Pa.C.S. §1547. Muniz nevertheless refused to submit to an Intoxilyzer 5000 breath test. As standard operating procedure at the Booking Center, Muniz was videotaped during his processing and later issued his Miranda warnings.

On May 20, 1987, Muniz was tried at a bench trial before the Honorable George Hoffer in the Court of Common Pleas of Cumberland County and convicted of driving while under the influence of alcohol, 75 Pa.C.S. §3731(a)(1). Post-trial motions were filed and denied by the court.

Having been previously convicted of driving under the influence in 1985, Muniz was then sentenced to pay the costs of prosecution, a $310.00 fine, and to undergo mandatory imprisonment in the Cumberland County prison for a period of not less than forty-five days nor more than twenty-three months. This appeal followed.

Muniz advances the following three issues for our review: (1) whether the trial court erred by refusing to suppress videotaped statements made by him prior to being advised of his constitutional rights; (2) whether trial counsel was ineffective for failing to object to or challenge his defective jury trial waiver colloquy; and (3) whether trial counsel was ineffective for failing to properly object to the admission of evidence concerning the horizontal gaze nystagmus field sobriety tests.

Muniz first claims that the trial court erred in failing to suppress the statements appearing on the videotaped portion

of his processing at the Booking Center. He maintains that the videotape reflects that, prior to being advised of his constitutional rights, he was asked a series of questions including his address, height, weight, color of eyes, date of birth, age, and the date of his sixth birthday. He also avers that, prior to his Miranda warnings, he was informed of the Implied Consent Law, and after making several inquiries about its content, acknowledged that he understood it. He thereafter informed the Booking Center authorities that he had recently finished serving a license suspension and did not want it suspended again. All of these communications to the police, he alleges, were testimonial in nature, and thus protected by his constitutional right against self-incrimination.

The fifth amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution protect each Pennsylvania citizen from being compelled to

be a witness against oneself in any criminal case. In Schmerber v. California, 384 U.S. 757 (1966), the Supreme Court proclaimed that this constitutional guarantee "protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature...." 384 U.S. at 761. Likewise, "Pennsylvania appellate courts have held that Article I, Section 9 of the Pennsylvania Constitution offers a protection against self-incrimination identical to that provided by the Fifth Amendment." Commonwealth v. Conway, ___ Pa. Super. _____, _____, 534 A.2d 541, 546 (1987).

To ensure that a suspect's constitutionally guaranteed right against self-incrimination is not abridged by the actions of overzealous law enforcement officials, the Supreme Court has directed that, prior to custodial interrogation, a suspect must be informed that "he has a right to remain silent, that any statement he does

make may be used against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda v. Arizona, 384 U.S. 436, 444-45 (1966). However, Miranda warnings need be given only when one is actually subjected to custodial interrogation. Id. at 444. "In Pennsylvania, 'custodial interrogation does not require that police make a formal arrest, nor that the police intend to make an arrest... Rather, the test of custodial interrogation is whether the individual believed his freedom of action is being restricted." Commonwealth v. Bruder, ____ Pa. Super. ____, ____ 528 A.2d 1385, 1387 (1987) (citations omitted). In the instant case, the record undeniably reflects that Muniz was in custody for purposes of Miranda when Officer Spotts arrested him after failing the three field sobriety tests. Accordingly, any testimonial or communicative statements elicited from Muniz following his arrest and before he received his Miranda warnings should have been suppressed for trial

purposes unless he effectuated a voluntary, knowing, and intelligent waiver of his rights.

Notwithstanding the above-referenced rule, not all aspects of a roadside custodial stop, and subsequent administration of field sobriety test, will be considered as testimonial or communicative and thus subject to suppression where Miranda warnings were not administered. In Commonwealth v. Benson, 280 Pa. Super. 20, 421 A.2d 383 (1980), we held that:

> Requiring a driver to perform physical tests or to take a breath analysis test does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial, and therefore, no Miranda warnings are required.

280 Pa. Super. at 29, 421 A.2d at 387. Consequently, when Officer Spotts asked Muniz to submit to a field sobriety test, and later

perform these tests before the videotape camera, no Miranda warnings were required. Commonwealth v. Romesburg, 353 Pa. Super. 215, 509 A.2d 413 (1986). It is only when the physical nature of the tests begins to yield testimonial and communicative statements that the protections afforded by Miranda are invoked. Here, it is evident that the physical nature of Muniz's tests began to take on the attributes of testimonial statements when, prior to the issuance of his Miranda warnings, he was asked a variety of personal questions, to which he readily responded. During this time, he also made several inquiries concerning the import of the Implied Consent Law, and commented upon his state of inebriation and the probable legal implications of his actions. These verbalizations clearly fall within the protections afforded by the fifth amendment. Commonwealth v. Waggoner,

_____ Pa. Super. _____, 540 A.2d 280 (1988).

In Commonwealth v. Bruder,

_____ Pa. Super. _____, 528 A.2d 1385 (1987), we were confronted with a factual scenario wherein the appellant, Thomas Bruder, was stopped by a patrolman after the officer witnessed him pass through a red light. Upon observing the classic indicia of intoxication, the officer asked the suspect to walk a straight line and recite the alphabet. Miranda warnings had not been issued before the officer's request. The results of these tests were admitted into evidence at Bruder's trial. On appeal, Bruder argued that the recitation of the alphabet was communicative in nature, and that the results of this test should have been suppressed. We agreed and stated that:

> Although requiring Bruder to walk in a straight line was a physical test which need not have been preceded by Miranda warnings, we cannot readily reach the same conclusion regarding Bruder's

recitation of the alphabet. Whereas the constitutional protection against self-incrimination which Miranda was designed to protect does not encompass physical evidence, it does refer to testimonial evidence.... We view the recitation of the alphabet as essentially communicative in nature. Therefore, because the recitation was elicited before Bruder received his Miranda warnings, it should have been excluded as evidence.

_____ Pa. Super. _____, 528 A.2d at 1388. Similarly, in Commonwealth v. Conway, _____ Pa. Super. _____, 534 A.2d 541 (1987), we further expounded upon the "Bruder analysis" and determined that the trial court properly suppressed the audio portion of a videotape that contained the appellant, James Conway, performing field sobriety tests. Following his arrest for driving under the

influence of alcohol, Conway invoked his Miranda rights during a videotaped conversation with the authorities. Thereafter, he was filmed performing three sobriety tests. During these tests Conway conversed with the officer, often requesting further clarification of his instructions. As part of these tests, Conway was also compelled to balance himself on one leg and count from 1,001 to 1,030. He was also questioned as to the amount and type of alcohol that he consumed. Prior to trial, Conway moved to suppress various portions of the videotape, arguing that it violated his privilege against self-incrimination. The trial court granted the suppression motion and the Commonwealth appealed, claiming that the suppressed evidence was neither testimonial nor compelled, and therefore not protected by the privilege against self-incrimination. Finding to the contrary, Judge Montemuro opined:

> [Mr. Conway] was required to give more than physical evidence when he

demonstrated his physical coordination on the sobriety tests. The test procedure was structured so that [Mr. Conway] was compelled to reveal his thought processes by asking for clarification of some of the officer's instructions, and his statements in response thereto manifest his confusion. Because confusion is arguably a sign of intoxication, [Mr. Conway] was forced to incriminate himself by "communicating" his confusion while performing the tests.... That [Mr. Conway's] statements are communicative cannot be questioned in light of our conclusion [in Commonwealth v. Bruder] that Mr. Bruder's recitation of the alphabet was communicative. Mr. Bruder was told by the police exactly what to say while the content of [Mr. Conway's] statements was more

> within his volitional control. By seeking clarification of the police officer's instructions, [Mr. Conway] expressed his thought processes far more than did Mr. Bruder in his recitation. There is a greater communicative or testimonial aspect in [Mr. Conway's] statements than in Mr. Bruder's recitation.

_____ Pa. Super. at _____, 534 A.2d at 546-57.

As in Conway, we conclude that Mr. Muniz was subjected to questioning that elicited information revealing his thought processes rather than statistical information that is commonly committed to rote memorization. Our in-chambers review of Muniz's videotape discloses the commencement of proceedings at the Booking Center at 3:54 a.m. At 3:57 a.m., Jerry Hosterman, a processing officer, asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of Muniz's

sixth birthday. When Muniz proved unable to calculate the date of his sixth birthday, Officer Hosterman administered the same three tests that Muniz performed for Officer Spotts alongside Route 15. During the entire course of these tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. At approximately 4:18 a.m., Lisa Deyo, another worker at the center, read the Implied Consent Law to Muniz. After questioning Deyo in detail about its legal implications, Muniz declined to submit to the Intoxilyzer 5000 breath test. Afterwards, at 4:29 a.m., Muniz was issued his Miranda warnings for the first time since his arrest.

Although questions surrounding a persons height, weight and age are ostensibly requested for record-keeping purposes only, such a purpose cannot be inferred from the Booking Center's question requiring Muniz to calculate the date of his sixth birthday.

Moreover, the questions posited by Muniz during his on-camera physical sobriety tests are precisely the sort of testimonial evidence that we expressly protected in Conway. It is also critical to note that none of Muniz's utterances were spontaneous, voluntary verbalizations. Rather, they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center. Since the above-referenced responses and communications were elicited before Muniz received his Miranda warnings, they should have been excluded as evidence.

"In order to reverse on the basis of introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the tainted evidence." Bruder, _____ Pa. Super. at _____, 528 A.2d at 1388 (citations omitted). Here, Muniz's videotaped responses were clearly prejudicial, and certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state

of drunkenness that prohibited him from safely operating his vehicle. The absence of such evidence may very well have led to a different verdict. Accordingly, we conclude that Judge Hoffer abused his discretion in refusing to suppress the evidence, and consequently the case must be reversed and remanded for a new trial. Because of our disposition of Muniz's first allegation of error, we need not address his remaining two claims.

Reversed and remanded for proceedings consistent with this opinion. Jurisdiction is relinquished.

DISSENTING OPINION BY OLSZEWSKI, J.

DATED: September 8, 1988

JUDGMENT ENTERED

/s/Mildred E. Williamson
Deputy Prothonotary

J. 57023/88

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
INOCENCIO MUNIZ, Appellant	:	No. 157 Harrisburg 1988

Appeal from Judgment of Sentence February 2, 1988, in the Court of Common Pleas of Cumberland County, Criminal No. 172 Criminal 1987.

BEFORE: CIRILLO, P.J., and OLSZEWSKI and MONTEMURO, JJ.

DISSENTING OPINION BY OLSZEWSKI, J.:

FILED: September 8, 1988

While I agree wholeheartedly with Commonwealth v. Bruder, ____ Pa.Super.____, 528 A.2d 1385 (1987) and Commonwealth v. Conway, 368 Pa.Super. 488, 534 A.2d 541 (1987), that Miranda warnings must be given prior to custodial interrogation, I must respectfully dissent. As this Court stated in Bruder: "In order to reverse on the basis of introduction of inadmissible evidence, we must find an abuse of discretion as well as a showing of actual prejudice resulting from the

tainted evidence." Bruder, ____ Pa.Super. at _____, 528 A.2d at 1388. Instantly, I would find that the only inadmissible evidence was the police officer's request that appellant calculate the date of his sixth birthday and appellant's response thereto. Thus, I would find that appellant was not prejudiced by the introduction of inadmissible evidence since this was a non-jury trial and the trial judge was presented with enough evidence to convict appellant even without the tainted evidence.

Accordingly, I would affirm the judgment of sentence.

APPENDIX C

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	
	:	172 CRIMINAL 1987
V.	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS AND
	:	REQUIRED SIGNALS
	:	(SUMMARY)
INOCENCIO MUNIZ	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT

Before HOFFER, J. and BAYLEY, J.

ORDER OF COURT

AND NOW, October 29, 1987,

defendant's motions for a new trial and in arrest of judgment are DENIED. Upon completion of a short-form presentence investigation report by the Probation Office, the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court,
/s/GEH
George E. Hoffer, J.

Edward Guido, Esquire
Assistant District Attorney
For the Commonwealth
Carl Stoner, Esquire
For the Defendant

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	
	:	172 CRIMINAL 1987
V.	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS AND
	:	REQUIRED SIGNALS
	:	(SUMMARY)
INOCENCIO MUNIZ	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT

Before HOFFER, J. and BAYLEY, J.

OPINION AND ORDER OF COURT

On May 20, 1987, following a nonjury trial, the defendant was found guilty to a count of Driving Under the Influence. At trial, over his objections, evidence was admitted as to defendant's performance of field sobriety tests, the videotape of the defendant, and responses made by defendant during the course of the videotaping, prior to the defendant's having been given his Miranda warnings. The defendant filed motions for a new trial and in arrest of judgment.

The test of the sufficiency of evidence to convict the defendant is whether, viewing all evidence admitted in a light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom, it is sufficient to enable the trier of fact to find every element of the crime charged beyond a reasonable doubt. Commonwealth v. Litzerberger, 333 Pa. Superior Ct. 471, 482 A.2d 968 (1986).

On November 30, 1986, at approximately 2:50 a.m., a police officer of the Upper Allen Township Police Department, while patrolling on Route 15, noticed a vehicle stopped on the berm with its engine running and its four-way flashers activated. Thinking the vehicle disabled, he stopped behind the vehicle and approached it in order to offer assistance to the occupants. His investigation revealed two people in the front seat, one of whom was the defendant driver. While conversing with the defendant, the officer detected a strong odor of alcohol on

defendant's breath, noticed that his eyes were bloodshot and glazed, and that his face was flushed. In addition, the officer noticed that the defendant did not have good command of his coordination skills.

At that point, the officer warned the defendant twice to wait until he had sobered up before driving. Although the defendant had responded affirmatively to the officer's requests, the officer did not even reach his vehicle before hearing the defendant's vehicle start to pull onto the highway. The officer proceeded to follow the defendant and stopped him about a half-mile down the road. The officer asked the defendant to produce his license and registration cards; however, the defendant fumbled with his wallet, dropped a few cards and handed the officer the wrong identification. After a second request, the defendant located the proper identification. The defendant was then placed under arrest and transported to the West Shore facility of the

Cumberland County Central Booking Center for processing. While at the center, the defendant refused to submit to a breath test, all of which was routinely videotaped.

The defendant, in his post trial motions, raised several claims, some of which have been abandoned through lack of argument. The first was a boilerplate claim that the verdict was contrary to the evidence. Since no specifics are set forth, this claim must be dismissed. Commonwealth v. Beckham, 349 Pa. Super. 430, 503 A.2d 443 (1986). However, even on the merits, the evidence read in a light most favorable to the Commonwealth overwhelmingly proved beyond a reasonable doubt that defendant operated his vehicle while under the influence of alcohol to a degree which rendered him incapable of safe driving.

Lastly, the defendant seeks a new trial on the argument that the court erred in failing to suppress the testimony relating to the defendant's field sobriety tests, and the

videotape taken at the booking center, because they were incriminating and completed prior to the defendant's receiving his Miranda warnings. The answer is that it is well settled law in Pennsylvania that:

> requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required.

Commonwealth v. Benson, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980). See also Commonwealth v. Bruder, ___ Pa. Super. ___, 528 A.2d 1385 (1987). This would likewise hold true for the videotape of the defendant taken at the booking center, particularly where, as here, the defendant gave no incriminating statement; rather it was the defendant's actions that were incriminating.

For the foregoing reasons, the following Order of Court is entered:

ORDER OF COURT

AND NOW, October 29, 1987, defendant's motions for a new trial and in arrest of judgment are DENIED. Upon completion of a short-form presentence investigation report by the Probation Office, the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court,

/s/ George E. Hoffer
George E. Hoffer, J.

Edward Guido, Esquire
Assistant District Attorney
For the Commonwealth

Carl Stoner, Esquire
For the Defendant

APPENDIX D

COMMONWEALTH	:	IN THE COURT OF COMMON
	:	PLEAS OF CUMBERLAND
	:	COUNTY, PENNSYLVANIA
	:	172 CRIMINAL 1987
VS	:	CHARGE: (A) DRIVING UNDER
	:	THE INFLUENCE
	:	(B) TURNING
	:	MOVEMENTS &
	:	REQUIRED SIGNALS
INOCENCIO MUNIZ	:	(Sum.)
OTN: B454590-3	:	AFFIANT: PTL. DAVID SPOTTS

IN RE: SENTENCE

ORDER OF COURT

AND NOW, February 2, 1988,

10:34 a.m., Inocencio Muniz, having appeared for sentence together with personal counsel, Carl B. Stoner, Jr., Esquire, and the court having received a presentence investigation report after the defendant's non-jury trial conviction (it appearing from the psi that this is a second offense for mandatory sentencing purposes but a third offense in actual fact), sentence of the court on Count A is that the defendant pay the costs of prosecution, that he pay a fine of $310, including $10 to the Emergency Relief Fund,

and that he undergo imprisonment in the Cumberland County Prison for a period of not less than 45 days nor more than 23 months.

Sentence of the court on Count B is that the defendant pay the costs of prosecution and a fine of $35, including $10 to the Emergency Relief Fund.

Upon the defendant's eventual parole, we direct the defendant to enter into a payment plan for the payment of the various sums due so that they can be paid within six months of today's date, that he enroll in, pay for and successfully complete the DUI school as run by the County, that he absolutely refrain from the use of alcohol and/or drugs during the period of this sentence, and that he submit to and pay for urine testing as directed and requested by the Probation Office, and that he complete such counseling as is directed by the Probation Office.

It appearing to the court that the defendant had filed post trial motions to our jury finding, bail shall be continued, with

the concurrence of the District Attorney, in that the defendant may continue to be released on his own recognizance pending appeal. Should no appeal be perfected within the time limits, the defendant is directed to immediately surrender himself to the Cumberland County Sheriff at the expiration of the appeal period.

The defendant is immediately directed to surrender his license to the Clerk of the Court for transmission to PennDOT for the appropriate period of suspension.

By the Court,

/s/GEH
George E. Hoffer, J.

Shawn C. Wagner, Esquire
Assistant District Attorney

Carl B. Stoner, Jr., Esquire
For the Defendant

CCP

:mtf

89-213

NO. 83-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

INOCENCIO MUNIZ,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

JOINT APPENDIX

J. MICHAEL EAKIN*
DISTRICT ATTORNEY OF
CUMBERLAND COUNTY,
PENNSYLVANIA

RICHARD F. MAFFETT, JR*
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2201 N. SECOND STREET
HARRISBURG, PA 17110
(717) 233-4141
Counsel for Respondent

SYNDI L. NORRIS
SENIOR ASSISTANT
DISTRICT ATTORNEY
CHIEF, APPELLATE DIVISION

CUMBERLAND COUNTY COURTHOUSE
South Hanover Street
Carlisle, PA 17013
(717) 240-6210
Counsel for Petitioner
*Counsel of Record

PETITION FOR CERTIORARI FILED JULY 6, 1989
CERTIORARI GRANTED OCTOBER 16, 1989

TABLE OF CONTENTS

RELEVANT DOCKET ENTRIES

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

172 CRIMINAL 1987

(Title omitted in printing)

FILED: May 8, 1987 PAGE 10

IN RE: OMNIBUS PRE-TRIAL MOTIONS

ORDER OF COURT

AND NOW, May 1, 1987, 2:44 p.m., after hearing and consideration of the testimony presented and the cases presented by counsel, defendant's motion to dismiss the prosecution is overruled and dismissed; the defendant's motion to suppress evidence against the defendant is refused and dismissed.

By the Court,

George E. Hoffer, J.

LODGED: JUNE 29, 1987 PAGE 12

FILED: JULY 6, 1987

IN RE: NON JURY TRIAL PROCEEDINGS

BEFORE: HONORABLE GEORGE E. HOFFER, J.

DATE : Wednesday, May 20, 1987, 1:30 p.m.

PLACE : Courtroom No. 3
Cumberland County
Courthouse
Carlisle, Pennsylvania

Containing 24 pages

FILED: MAY 22, 1987 PAGE 13

STATE EXHIBIT 1
FILED: MAY 22, 1987 PAGE 14

IN RE: NON-JURY TRIAL

ORDER OF COURT

AND NOW, May 20, 1987, 2:57 p.m., after hearing and consideration of the evidence presented, we do find beyond a reasonable doubt that the defendant is guilty of Counts A and B.

By the Court,

George E. Hoffer, J.

FILED: OCTOBER 29, 1987 PAGE 20

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT
BEFORE HOFFER, J. and
BAYLEY, J.

OPINION AND ORDER OF COURT

Containing 4 pages

IN RE: MOTION FOR NEW TRIAL
AND IN ARREST OF JUDGMENT
Before HOFFER, J.
and BAYLEY, J.

ORDER OF COURT

AND NOW, October 29, 1987,

defendant's motion for new trial and in arrest of judgment are DENIED. Upon completion of a short-form pre-sentence investigation report by the Probation Office, the defendant is directed to appear for sentence at the call of the District Attorney.

By the Court,

George E. Hoffer, J.

DEFENDANT'S OMNIBUS PRETRIAL MOTION

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

172 CRIMINAL 1987

(Title omitted in printing)

ORDER

AND NOW, this 14th day of April, 1987, upon consideration of the foregoing Omnibus Pre-Trial Motion and upon oral motion of Carl B. Stoner, Jr., Esquire, attorney for the defendant, Inocencio Muniz, a hearing on said Motion is scheduled for the 1st day of May, 1987 at 1:30 p.m. in Court Room 3, Cumberland County Court House, Carlisle, Pennsylvania.

By the Court,

George E. Hoffer, J.

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

172 CRIMINAL 1987

(Title omitted in printing)

OMNIBUS PRE-TRIAL MOTION

TO THE HONORABLE JUDGES OF THE SAID COURT:

The defendant, INOCENCIO MUNIZ, by his attorney, Carl B. Stoner, Jr., makes the following Omnibus Pre-Trial Motion pursuant to R.Crim.P. 306, and in support thereof avers the following:

I. MOTION TO DISMISS PROSECUTION

1. The defendant's motion to dismiss the prosecution is made because the statute in question 75 Pa. C.S.A. Section 3731, is unconstitutional.

2. 75 Pa. C.S.A. Section 3731(f) is unconstitutional in that it is in direct conflict with Pennsylvania Rules of Criminal

Procedure 141(d), 145 and 151 thus making it violative of Article V, Section 10(c) of the Pennsylvania Constitution.

3. 75 Pa. C.S.A. Section 3731 is unconstitutionally vague under the standards of the Federal and Pennsylvania Constitutions in that there is no rational basis for the .10% per se violation standard as enumerated in Section 3731(a)(4) or for the presumption that any scientific test results are valid.

4. 75 Pa. C.S.A. Section 3731 is unconstitutional in that Section 3731(a) improperly shifts the burden of proof onto the defendant and destroys the presumption of innocence which is violative of the due process guarantees of the Federal and State Constitutions.

5. 75 Pa. C.S.A. Section 3731 is unconstitutional in that the mandatory sentencing provisions of the statute under which the defendant is charged are unconstitutional in that they violate the due process clauses of the United States and

Pennsylvania Constitutions and violate the ex post facto clauses of the Federal and State Constitutions. (State Constitution Article I, Section 17).

WHEREFORE, the defendant, INOCENCIO MUNIZ, respectfully requests this Honorable Court dismiss the prosecution on the basis of the unconstitutional nature of 75 Pa. C.S.A. Section 3731 under both the Federal and State Constitutions.

II. MOTION TO SUPPRESS EVIDENCE

The defendant, INOCENCIO MUNIZ, moves this Honorable Court to suppress all evidence pursuant to Pa.R.Crim.P. 323 and in support thereof avers the following:

1. The arresting officer failed to advise the defendant of his rights to have his personal physician examine him in lieu of taking a breathalizer [sic] test and failed to advise him that he could submit to a blood test rather than a breathalizer [sic] test as

required by the laws of the Commonwealth of Pennsylvania.

2. The evidence gathered as a result of the arrest, search and seizure of the defendant was obtained illegally in that said search was performed without a warrant and without probable cause whatsoever.

3. Any evidence obtained by the Commonwealth from observation or interrogation of the defendant, before, during or after the above described searches and seizures was obtained without a warrant and without probable cause whatsoever.

4. Any oral or written statements, confessions or admissions allegedly obtained from the defendant were the product of illegal warrantless arrest performed without probable cause, and were without the defendant being advised of his rights pursuant to the case law of the United States of America, and were not the result of a voluntary, intelligent and knowing waiver of his right to remain silent.

5. Expert and/or opinion testimony or evidence obtained as a result of the above arrest, searches and seizures, including but not limited to any investigation, analysis, report, or scientific study anything searched or seized from the defendant was obtained through a warrantless arrest without probable cause and should be suppressed.

WHEREFORE, the defendant, INOCENCIO MUNIZ, respectfully requests this Honorable Court grant his motion pursuant to Pa.R.Crim.P. 306 and 323, and suppress the evidence of any and all scientific tests, chemical or otherwise performed on the defendant on the basis of an illegal arrest and/or search and seizure and further suppress all physical evidence as well as any statements or confessions, on the basis of said illegal arrest and/or search and seizure.

Respectfully submitted,

Carl B. Stoner, Jr.,
Attorney for Defendant,
Inocencio Muniz

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

172 CRIMINAL 1987

(Title omitted in printing)

IN RE: NON-JURY TRIAL PROCEEDINGS

[4]

DIRECT EXAMINATION

BY MR. EBERT:

Q Sir, would you please state your full name, and spell your last name for the record?

A I am David J. Spotts, S-p-o-t-t-s.

Q And where are you employed, sir?

A I am employed by the Upper Allen Township Police Department. My current rank is corporal.

Q Were you so employed on November 30, 1986, a Sunday?

A Yes, I was. However, at that time I was a patrol officer.

Q How long have you been employed by the Upper Allen Township Police Department?

A I have been employed by Upper Allen since March 14, 1978.

Q How long have you been involved in police work as a police officer?

A Since July 17, 1975.

Q Have you ever been involved in any arrests for Driving Under the Influence in this state?

A Yes, numerous.

Q And have you observed intoxicated people while performing your duties as a police officer?

A Once again, very many times.

Q Turning your attention specifically to Sunday, November 30, 1986, at approximately 2:50 a.m., in the early morning hours of that Sunday, were you on duty at that time, sir?

A Yes, I was.

Q And what were you wearing at that time?

A I was in full uniform.

Q What type of duty were you performing, sir?

A I was on -- at that particular time I was on routine patrol duty. I was traveling north on U.S. Route 15 and was approaching the intersection with Pa. Route 114.

Q Were you operating a police vehicle at that time?

A Yes, sir.

Q What, if anything, unusual caught your attention at that time?

A As I came up on the intersection -- this would have been about 2:51 in the morning -- I observed a vehicle off on the berm of the road on U.S. Route 15 northbound. This vehicle had its four-way flashers activated and there were two people in the vehicle. At that time my first thought was it was a disabled vehicle, since it was almost 3 in the morning. So I stopped to offer assistance.

I pulled up behind that vehicle, put the four-ways on on my cruiser, got out and walked up to the driver's side door of the vehicle. There were two Hispanic males located in the front seat. The person who was seated behind the wheel of the vehicle was the defendant in today's proceeding, who is seated to my far left at the defense table.

Q Is the same individual you saw that early morning Sunday, November 30th?

A That is correct.

Q Now, what transpired then, sir?

A I asked him what the problem was. At that point still believing that there was, you know, a mechanical or disablement problem. He advised me then that he had stopped to urinate, although those weren't the exact words he used. When he talked at that point, I immediately detected a strong odor of alcoholic beverage on his breath. His eyes were also bloodshot and glazed over. His face appeared flushed. Even at that point while he was sitting in the vehicle, he didn't appear

to have good command of his coordination skills. So at that point I advised him that I didn't feel that he should be driving, he should wait there, remain alongside the road until he was in a condition to drive safely.

Q What happened then, sir?

A Well, at that point, we have eye-to-eye contact, I am looking directly at him, he says okay, I will. I once again repeated, I said, I mean it, I don't want you driving until you can drive. I believe I even said at that point I think you're too drunk to drive, stay on the side of the road, wait there. And again he said okay. He is looking directly at me, you know, I mean we are eye-to-eye contact, he says okay.

At that point I turned to return to my cruiser. I didn't even get the door open on my cruiser to get back into it when I heard the vehicle start to move forward again, the stones crunching on the gravel, things along the berm of the road. I turned around to see the vehicle being operated by the defendant

pulling back out on to the highway to travel north on U.S. Route 15.

Q Had the engine been running all this time?

A Yes.

Q So even when you stopped the first time, the motor was running on the car?

A Yes.

Q So he pulls out on to the road. At that time had he used his signals to enter the lane of traffic?

A No, he did not.

Q Was that the basic for the summary citation you filed on this charge?

A Yes, that is correct.

Q Now, once he pulled out, after you admonished him not to, what did you do then, sir?

A I got back into my cruiser, activated the emergency warning lights and pulled him over approximately a half mile farther down the road.

Q And what happened?

A At that point, I asked him to step out of the vehicle and submit to some field sobriety tests.

Q Had you requested that he produce the registration and license plate?

A Yeah, first, yes, that is correct. In the initial contact I had with him, I did not ask him to produce any identification for him. The second time when I stopped him, after I saw him pull back out, I did ask him to produce a driver's license and registration card. He got out his wallet --

MR. STONER: If it please the court, I would like to object just for the purpose of preserving the points in the pretrial motion. I don't want to continue to object. I would ask that this be a continuous objection to any evidence or any testimony relative to what the defendant said or did or any tests performed or what the officer said or did from the time he was stopped the second time until the Miranda warnings were given to him, I think

4:27 a.m. or whatever. Just for the record I would like to have a continuing objection. This was the basis of our pretrial motion which has previously been decided.

THE COURT: The officer's observations of the defendant in the vehicle, is that what you are saying?

MR. STONER: I was saying after he stopped him the second time, it is our position that he was actually under arrest at that time. I think the officer started to testify he asked him to do something. And from that point on I would like to object to any testimony.

THE COURT: I am not sure I understand the basis for objecting to the officer's observations, but I note your objection.

MR. STONER: Okay.

BY MR. EBERT:

Q Was he able to produce the cards you requested?

A When he opened up his wallet, he had a lot of different cards in it, and he was fumbling through the cards, some dropped. He picked them up. He handed me two cards. I asked him to produce his driver's license and vehicle registration. He handed me two cards, one of which was a Social Security card. And the other was some kind of identification card, reference to farm or migrant labor. But it was a -- I believe a U.S. Department of Agriculture, some type of identification card.

Q He didn't provide you with what you had asked for?

A No. I returned those two to him and asked him once again. I told him I asked for your driver's license and registration card. After some more fumbling and dropping the cards, he did finally produce his driver's license and registration card for me.

Q Are you familiar with the term standard field sobriety tests?

A Yes.

Q Did you have occasion to administer field sobriety tests to this defendant?

A Yes, I did.

Q Generally what tests did you give him, sir?

A Horizontal gaze nystagmus, walk and turn, one-leg stand, in that sequence.

Q Have you been trained to administer those tests, sir?

A Yes, that is correct.

Q And prior to this occasion had you previously administered the tests in similar situations?

A Many times.

Q Without going into extreme detail, what was the result of the tests?

A He failed all three tests.

Q Now, after he failed the tests, sir, what action did you take then?

A I informed him then -- and this would have been about two minutes after three in the morning -- that he was under arrest for

Driving Under the Influence of alcohol. I attempted to put him into a position to search and handcuff him at the front of my cruiser. I was able finally to search him and handcuff him and had him -- put him in the back of my patrol vehicle. At about that time that I was placing him in the back of my patrol vehicle, Officer Scott Pellman from Mechanicsburg arrived to check on me. As is standard procedure for traffic stops at night.

Q Did the defendant make any statements to you that were not -- did you at any time question him at the scene?

A Except I asked -- except asking him to produce documents already testified to and I did ask him to submit to field sobriety tests.

Q Did he make any other statements though that weren't responsive to questions that you asked?

A Yes.

Q And what did he say?

A He made many statements on the scene indicating that he was drinking -- that he had been drinking beer, that he was drunk. He made statements, you got me, haven't you ever done this before? I'm drunk, I can't do these tests. Those kind of comments were made at the scene.

After he was placed in my patrol car, I transported him to the West Shore facility of Cumberland County Central Booking. While enroute there he made additional statements to me. I was not asking him any questions. I am not even speaking to him at all at that point. He kept saying -- he asked me if I could let him go. He asked me didn't I ever drink a few too many and go out driving on the roads. Which I responded to his questions to me, but I did not initiate any question with him. He made statements also relating the fact that he was drunk.

Q Did you finally get to the West Shore processing center?

A Yes.

Q And who did you release custody of the defendant to?

A Well, the booking agents on duty at that time were Terry Hosterman and Lisa Deyo. However, when I first arrived at the Booking Center they were processing another DUI suspect from a complete and unrelated incident. So I remained at the Booking Center in the holding area with the defendant for approximately 25 minutes until Agent Hosterman came out and then I released him to the custody of Agent Hosterman and I left.

Q Sir, do you have an opinion as to whether or not this defendant was intoxicated at the time he was driving his vehicle at 2:52 a.m. on the Sunday morning of November 30, 1986?

A Without a doubt, I have absolutely no reservation that the defendant was intoxicated, in my opinion.

MR. EBERT: Thank you, sir. Cross-examine.

MR. STONER: I have no questions, officer. Thank you.

MR. EBERT: Thank you. Call Lisa Deyo.

LISA T. DEYO, called as a witness, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. EBERT:

Q Ma'am, would you please state your full name, and spell your last name for the record?

A Lisa T. Deyo. D-e-y-o.

Q And where are you employed?

A At the Cumberland County Central Booking Center in the West Shore Police Records.

Q How long have you been performing duties with the Booking Center?

A Since October of 1986.

Q Had you been -- that is when the program started, is that correct?

A Yes.

Q Had you received any specific training in order to perform your duties with the Center, ma'am?

A At that time I was certified to operate the Intoxilyzer 5000.

Q Were you also trained in the use of the video equipment which is part of the Booking Center?

A Yes.

Q Were you present for the processing of this defendant, Inocencio Muniz, on the early morning hours of November 26th?

A Yes, I was.

Q And while I use the name Inocencio Muniz, do you see the person who you processed that morning in the court today?

A Yes, he is seated at the defense table next to Mr. Stoner.

THE COURT: What date did you give?

MR. EBERT: November 30th, I'm sorry.

BY MR. EBERT:

Q To clarify the record, you were on duty on the Sunday morning, November 30, 1986?

A Yes, I was.

Q And what [sic] is when Mr. Muniz, whom you have just identified, was processed?

A Yes.

Q During the course of the processing at the Booking Center, did Mr. Muniz execute a Miranda warning?

A He was read his Miranda warnings.

Q And did he eventually sign the warning statement?

A Yes, he did.

Q I am going to show you Commonwealth Exhibit No. 1. Do you recognize that?

A Yes.

Q And please tell the court what it is?

A It is the Miranda -- the standard Miranda warnings that we read to all of the DUI suspects whenever they are being processed after the intoxilyzer -- after they have been asked to take the Intoxilyzer 5000.

Q Who was with you on duty that day?

A Special Agent Terry Hosterman.

Q And did he co-sign underneath Mr. Muniz's signature?

A Yes, he did.

Q You were operating the video when Mr. Muniz actually signed the form?

A Yes, I was.

Q Now, I am going to show you Commonwealth Exhibit No. 2. Do you recognize that, ma'am?

A Yes, I do.

Q And what is that?

A That is the tape of the processing of Inocencio Muniz.

Q During the course of the -- of your processing, you indicated that you were an intoxilyzer operator?

A Yes, at that time I was.

Q Was the intoxilyzer at the West Shore processing center functional and available for testing that morning?

A Yes, it was.

Q Did you offer Mr. Muniz to take a test?

A Yes, I read to him the implied consent law several times. I did explain it to him. And he subsequently refused to take the Intoxilyzer 5000.

MR. EBERT: Your Honor, at this time I would move for admission of Commonwealth Exhibits 1 and 2 and propose to play the Commonwealth Exhibit 2 for the court.

MR. STONER: I would just object on the same basis as before, your Honor.

THE COURT: Commonwealth 1 and 2 are admitted.

You are going to play that on that machine.

MR. EBERT: Yes, sir.

THE COURT: All right. We need the lights out.

(Whereupon, the videotape was played for the court during which time the following questions and answers occurred.)

BY MR. EBERT:

That is you shown in Commonwealth Exhibit 2?

A Yes.

Q The individual that just spoke, is that Special Agent Hosterman?

A Yes, it is.

Q The person now seated in the chair on which you are now focusing, is that the defendant identified in court here today?

A Yes, that is Mr. Muniz.

Q Now, before we go on on the tape, there was a break here?

A We have to observe the defendant for 20 minutes. He was chewing gum when he walked in, and I noticed that at 0:400 [sic] hours. We would have had to observe him until 04:20 hours.

Q Where I just turned the tape off, am I correct that it was approximately 4:06 at that time?

A It was, yes.

Q And you would then have to wait how much longer then before you were able to administer the test?

A Approximately 14 minutes.

Q During that period did anything significant else happen while you observed the defendant?

A No, it did not.

MR. EBERT: Your Honor, at this time I would propose to advance the tape, unless Mr. Stoner would like to see the interim 14 minutes.

MR. STONER: No.

THE COURT: No what?

MR. STONER: No, I don't need to see the -- in response to his question, no, I don't want to see the intervening 14 minutes.

THE COURT: All right.

BY MR. EBERT:

Q You have now taken over as the intoxilyzer operator?

A That is correct.

Q Now, looking at Commonwealth Exhibit No. 1, that is why the no was crossed out and the yes was then written in?

A Yes, that is correct.

Q The last response to that last question was had he been drinking, is that correct?

A Yes, that is correct.

Q And the answer to the question was how many; how many did he indicate?

A He said 10 or 11 beers.

(Whereupon, more of the videotape was shown to the court.)

THE COURT: Is that the end of the tape?

MR. EBERT: It is not the end of the tape, Your Honor. I am willing to stop it here, unless Mr. Stoner would like to see the remainder.

THE COURT: Do you want him to keep playing it, Mr. Stoner? Perhaps there is something you wanted me to see on there.

MR. STONER: Just when the response to 10 or 11 beers, was there a question about over what period of time. Did I miss that? That was the only thing that would be of interest to me.

MR. EBERT: I will play it over.

MR. STONER: I have nothing further on this.

THE COURT: Anything else?

MR. EBERT: Your Honor, I have no further questions for this witness.

THE COURT: Mr. Stoner, any questions?

CROSS-EXAMINATION

BY MR. STONER:

Q The Commonwealth Exhibit No. 1, the Miranda warning, there isn't a time on that. But according to the video, I think 4:27 was when this was given to the defendant, is that correct?

A to the best of my knowledge.

MR. STONER: Okay, I have nothing further. Thank you.

MR. EBERT: Thank you. You may step down.

Your Honor, that would be the extent of the Commonwealth's evidence. We would move to rest at this time with the two exhibits already having been admitted.

THE COURT: The Commonwealth has rested, Mr. Stoner.

MR. STONER: We have nothing to present, your Honor.

THE COURT: Do I take it, Mr. Muniz, that you don't wish to testify?

MR. MUNIZ: I what?

THE COURT: Your counsel is saying that you do not wish to testify or present any evidence. Do you understand what I am saying?

MR. STONER: Your Honor, this is his wife, maybe she can interpret.

His Honor has asked you if you wish to testify. Do you wish to testify, yes or

no? Okay. Maybe you should state that. State that for the record. His Honor, Judge Hoffer, has asked you do you want to testify.

MR. MUNIZ: No.

MR. STONER: No.

MR. MUNIZ: No.

THE COURT: Is this the answer, that he does not want to testify, is that the answer?

MRS. MUNIZ: (Nods affirmatively.)

THE COURT: Mrs. Muniz nods yes, he doesn't want to testify.

MRS. MUNIZ: That is correct.

THE COURT: And Mr. Muniz does not dispute that.

Mr. Stoner, you have previously brought no problem to the attention of the court that this man had any language problem whatsoever. As a matter of fact, I looked on the tape and he didn't appear to have that much of a language problem to me on the tape. But if you thought he had one, sir, you should have brought it to my attention long before this.

MR. STONER: That is correct, your Honor. I agree, I did not think he has a language problem. It is just a couple words here and there apparently he did not understand. Testify happens to be one of them.

* * *

IN THE COURT OF COMMON PLEAS OF
CUMBERLAND COUNTY, PENNSYLVANIA

172 CRIMINAL 1987

(Title omitted in printing)

MOTION FOR A NEW TRIAL
AND IN ARREST OF JUDGMENT

AND NOW, this 1st day of June, 1987, the above named defendant by his attorney, Carl B. Stoner, Jr., Esquire, moves this Court pursuant to Pa. Rule Criminal Procedure 1123 for a new trial and in arrest of judgment in the above captioned matter for the following reasons:

1. The verdict is contrary to the evidence.

2. The verdict is contrary to the law in that:

A. The Honorable Court erroneously allowed into evidence statements made and acts performed by the defendant prior to the defendant being advised of his constitutional rights against self-incrimination.

B. 75 Pa. C.S.A. Section 3731 is unconstitutionally vague under the standards of the Federal and Pennsylvania Constitutions in that here is no rational basis for the 10% per se violation standard as enumerated in Section 3731(a)(4) or for the presumption that any scientific test results are valid.

3. The defendant reserves the right to file additional and supplemental reasons for a new trial ten days after the Notes of Testimony taken at the trial have been transcribed and a copy thereof made available to counsel for defendant.

Respectfully submitted,

Carl B. Stoner, Jr.
Attorney for Defendant

RELEVANT ORDERS AND OPINIONS BELOW

The relevant orders and opinions below are appended to the Petitioner's Petition for Writ of Certiorari, filed July 6, 1989, as Appendices A1 through D1.

NO. 89-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

V.

INOCENCIO MUNIZ,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BRIEF OF PETITIONER

J. MICHAEL EAKIN*
DISTRICT ATTORNEY OF
CUMBERLAND COUNTY,
PENNSYLVANIA

SYNDI L. NORRIS
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QUESTIONS PRESENTED

I. ARE PRE-MIRANDA STATEMENTS, INCIDENT TO ROUTINE BOOKING AND FIELD SOBRIETY TESTING, DEMONSTRATIVE RATHER THAN TESTIMONIAL, ALLOWING THEIR ADMISSION TO DEMONSTRATE PHYSICAL ABILITY TO SPEAK?

II. DO INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING AND ROUTINE BOOKING NECESSARILY CONSTITUTE "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The order of the Supreme Court of Pennsylvania denying the Commonwealth of Pennsylvania's petition for allowance of appeal is reported at ___ Pa. ___, 559 A.2d 36 (1989) and is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix A.

2. The Judgment and Opinion of the Superior Court of Pennsylvania, which reversed the decision of the trial court and remanded for proceedings consistent with its Opinion, is reported at ___ Pa. Super. ___, 547 A.2d 419 (1988) and is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix B.

3. The Opinion and Order of the Court of Common Pleas of Cumberland County, Pennsylvania, denying defendant's Motion for a New Trial and for Arrest of Judgment is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix C.

4. The judgment of sentence of the Court of Common Pleas of Cumberland County, Pennsylvania is reproduced in the petition for writ of certiorari filed July 6, 1989, as Appendix D.

JURISDICTION

The judgment of the Superior Court of Pennsylvania which is sought to be reviewed was rendered on September 8, 1988. The Supreme Court of Pennsylvania denied the Commonwealth's Petition for Allowance of Appeal by order dated May 10, 1989. The petition for writ of certiorari was filed July 6, 1989. This Court granted the petition on October 16, 1989.

The jurisdiction of this Court to review the Judgment and Opinion of the Superior Court of Pennsylvania, Middle District, is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution, Amendment 5, which provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

After a non-jury trial before the Honorable George E. Hoffer on May 20, 1987, the defendant, Inocencio Muniz, was found guilty of driving under the influence in violation of 75 Pa.C.S.A. §3731. Defendant's post-trial motions were denied. Having been previously convicted of driving under the influence in 1985, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Defendant's conviction was reversed by the Superior Court of Pennsylvania in an opinion filed September 8, 1988.

The defendant's conviction stems from an incident which took place on November 30, 1986. In the early morning hours, Officer David Spotts of the Upper Allen Township Police Department noticed the defendant's vehicle, with hazard lights flashing, stopped on the berm of Route 15 (J.A. 12).

Upon reaching the vehicle and speaking with the defendant, the officer noticed a strong odor of alcohol on the defendant's breath. The defendant's eyes were bloodshot, and his coordination skills were poor (J.A. 13-14).

Believing the defendant was intoxicated, Officer Spotts advised him to remain on the berm until he was sober and not to attempt to drive at that time. The defendant orally agreed to the officer's request, but before the officer had time to return to his own vehicle, the defendant pulled back onto the highway and proceeded to drive away (J.A. 14-15). The defendant was subsequently pulled over by the same officer, who asked for the defendant's license and registration (J.A. 15-16). After producing other documents, the defendant managed to provide the officer with the requested information (J.A. 18). The defendant failed several field sobriety tests, was placed under arrest, and was transported to the Central Booking Center (J.A. 19, 21).

The Booking Center routinely videotapes defendant who have been arrested for driving under the influence so that a permanent record of their condition will be preserved for trial. In accordance with that policy, the defendant was videotaped answering routine questions and taking sobriety tests (J.A. 23-24). The defendant refused to submit to a breathalyzer test (J.A. 27) After the refusal, the defendant was advised of his Miranda rights (State's Ex. 2, J.A. 25, 26).

In reversing the Judgment of Sentence, the Superior Court applied its rationale in Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987) allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed, Pennsylvania v. Bruder, ____ U.S. ____, 109 S.Ct. 205 (1988) (recitation of the alphabet was communicative in nature); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987) allocatur denied, ____ Pa. ____, 549 A.2d 914 (1988) (defendant's requests for

clarification of instructions to field sobriety tests were communicative in nature); Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280 (1988), allocatur denied, No. E.D. Allocatur Docket 1988 (October 19, 1988) (entire audio portion of videotape should have been suppressed absent valid waiver of Miranda rights). The Superior Court concluded that the entire audio portion of the videotape in this case constituted compelled testimonial evidence which was elicited before the defendant received Miranda warnings. Finding the evidence should have been excluded, and that the defendant was prejudiced by its admission, the case was reversed and remanded for a new trial.

SUMMARY OF THE ARGUMENT

The defendant, in this case, was routinely processed pursuant to his arrest for driving under the influence. He was required to provide routine background information and perform standard field sobriety tests, which tests involve counting out loud. The verbal portion of these field sobriety tests is demonstrative, rather than testimonial, evidence because it is not evidence upon which reliance is to be placed regarding the defendant's consciousness of facts or the operations of his mind in expressing his consciousness of facts. Rather, the verbal portion of the tests provide physical evidence of intoxication.

In addition to performing the verbal aspects of the field sobriety tests, the defendant made other statements during the processing, including explanations for his inability to perform the tests. None of these statements should have been suppressed because

they were not compelled. The questioning and conduct of the booking agents was designed to obtain routine booking information, explain and execute the standard field sobriety tests, and explain the Implied Consent Law relating to breath testing. None of the booking agents' conduct was designed or expected to elicit substantively incriminating statements by the defendant.

ARGUMENT

I. PRE-MIRANDA STATEMENTS, INCIDENT TO ROUTINE BOOKING AND SOBRIETY TESTING, ARE DEMONSTRATIVE RATHER THAN TESTIMONIAL, ALLOWING THEIR ADMISSION TO DEMONSTRATE PHYSICAL ABILITY TO SPEAK.

In the instant case, the defendant was videotaped during processing after his arrest for driving under the influence of alcohol. The videotape was part of the routine procedure. As part of processing, the defendant was asked to calculate the date of his sixth birthday, he was asked to count a series of numbers during field sobriety testing, and he was asked if he understood the instructions he was being given. Finally, he was asked if he understood the Implied Consent Law as it related to his right to refuse a breath test (State's Exhibit 2, J.A. 25, 26). The Superior Court of Pennsylvania held that the audio portion of the videotape should have

been suppressed because these were testimonial utterances compelled in violation of the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution.[1]

In reaching its decision in the instant case, the Pennsylvania Superior Court relied on its own rationale in Commonwealth v. Waggoner, 373 Pa. Super. 23, 540 A.2d 280, (1988), allocatur denied, No. 444 E.D. Allocatur Docket 1988 (October 19, 1988); Commonwealth v. Conway, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, _____ Pa. _____, 549 A.2d 914; and Commonwealth v. Bruder, 365 Pa. Super. 106, 528 A.2d 1385 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, reversed

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[1] The court decided that Article I, Section 9 of the Pennsylvania Constitution offers protection identical to that afforded by the Fifth Amendment of the Federal Constitution. Hence, this Court's interpretation of the federal protections controls the outcome of this case. Petition for Writ of Certiorari, filed July 6, 1989, Appendix B at B4.

Pennsylvania v. Bruder, ____ U.S. ____, 57 109 S.Ct. 205 (1988).[2] The Superior Court decided that the result in the instant case is controlled by its previous conclusions in Bruder and Conway that evidence of a defendant's inability to recite the alphabet and the videotaped evidence of a DUI defendant's conduct are communicative rather than demonstrative evidence.

The Superior Court incorrectly concluded that asking a person to demonstrate his physical ability to speak is testimonial in nature and thereby encompassed within the

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[2] This Court reversed the Superior Court's decision in Pennsylvania v. Bruder, ___ U.S. ___, ___, n.3 109 S.Ct. 205, 207 n.3 (1988)(reversing the Opinion of Cirillo, P.J.)(recognizing, but not reaching, the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence admissible under Miranda v. Arizona, 384 U.S. 436 (1966)).

protections of the Fifth Amendment.[3] This Court has previously held that the use of a defendant's voice as an identifying physical characteristic for the purpose of evaluating the physical properties of that voice does not violate the defendant's Fifth Amendment rights. United States v. Dionisio, 410 U.S. 1 (1973); United States v. Wade, 388 U.S. 218

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[3] Other state courts have held that statements incident to physical coordination tests including the recitation of the alphabet or the counting of numbers are not testimonial evidence within the purview of the Fifth Amendment. Palmer v. State, 604 P.2d 1106 (Alaska 1979); Lanford v. People, 159 Colo. 36, 409 P.2d 829 (1966); Oxholm v. District of Columbia, 464 A.2d 113 (D.C. App. 1983); State v. Mannion, 414 N.W.2d 119 (Iowa 1987) (dictum); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); State v. Breeden, 374 N.W.2d 560 (Minn. Ct. App. 1985); State v. Finley, 173 Mont. 162, 566 P.2d 1119 (1977); State v. Bottomly, 208 N.J. Super. 82, 504 A.2d 1223 (Law Div. 1984), aff'd, 209 N.J. Super. 23, 506 A.2d 1237 (App. Div. 1986); Pigua v. Hinger, 15 Ohio St.2d 110, 238 N.E.2d 766, cert. denied, 393 U.S. 1001 (1968); State v. Roadifer, 346 N.W.2d 438 (S.D. 1984); State v. Haefer, 110 Wis.2d 381, 328 N.W.2d 894 (Ct. App. 1982); Annot. 41 A.L.R. 812 §16 at 848-55 and cases cited therein. Cf. State v. Palmer, 206 Conn. 40, 536 A.2d 936 (1988); Macias v. State, 515 So.2d 206 (Fla. 1987).

(1967). There is nothing substantively incriminating in counting a sequence of numbers or in other conversation incident to the videotaping process. This Court has consistently recognized that "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." Doe v. United States, 487 U.S. _____, _____, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988) (footnote omitted). Thus, asking the defendant to count out loud during testing elicits demonstrative, not testimonial, evidence.

Additionally, as part of the processing, the Booking Agents asked the defendant a series of questions to obtain the background information necessary to book him. This evidence circumstantially showed his intoxication by his inability to speak clearly. However, it was non-testimonial in nature because it was not being utilized to prove the truth of that information. The

substance of the defendant's answers were immaterial to proving his intoxication. The import of the evidence was the defendant's manner of speech and the lack of muscular coordination of his tongue and mouth. This is simply the spoken equivalent of walking heel-to-toe down a straight line during the field testing of the muscular coordination of one's legs and torso, rather than of one's lips and tongue. The evidence obtained did not, explicitly or implicitly, relate a factual assertion or disclose information relevant to proving any element of the case against the defendant. This evidence was not testimonial and, therefore, was not protected by the Fifth Amendment.

II. INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS GIVEN TO AN INDIVIDUAL DURING FIELD SOBRIETY TESTING AND ROUTINE BOOKING DO NOT NECESSARILY CONSTITUTE "INTERROGATION" WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE.

In the instant case, the Superior Court of Pennsylvania concluded the audio portion of the defendant's videotaped performance at the Booking Center should have been excluded as evidence because it contained responses and communications elicited from the defendant before he received Miranda warnings. Miranda warnings are not required unless a defendant is subjected to custodial interrogation. Although this defendant was in custody, he was not subject to interrogation as that term is defined by law.

A defendant's statements are not the product of interrogation unless those statements were made in response to police

This Court has defined interrogation to encompass "words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980). On the other hand, "[i]n the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of Miranda [since] police words or actions normally attendant to arrest and custody do not constitute interrogation." South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983).

Upon arrival at the Booking Center, and prior to being advised of his constitutional rights, the defendant in this case was asked a series of questions including his address, height, weight, color of eyes, date of birth, age and the date of his sixth birthday. Thereafter, defendant was asked to

perform several field sobriety tests. During the course of testing, the defendant was asked whether or not he understood the instructions. Finally, prior to his Miranda warnings, defendant was informed of the Implied Consent Law.[4] After making several inquiries about its content, defendant acknowledged he understood it. Thereafter, the defendant stated he recently finished serving a license suspension and did not want his license suspended again (State's Exhibit 2, J.A. 25, 26).

Police conversation with the defendant during the initial routine questioning was not interrogation. All of the questions, except the date of his sixth birthday, were to obtain identifying information necessary to book the defendant. The questions were not designed to elicit any

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[4] Individuals driving on the roadways of Pennsylvania are statutorily deemed to have impliedly consented to undergo chemical testing to determine their blood alcohol content. 75 Pa.C.S. §1547.

substantively incriminating response. Therefore, Miranda warnings were not required. As this Court recently stated in Doe v. United States, ___ U.S. ___, 108 S.Ct. 2341, 2348, "Unless some attempt is made to secure a communication--written, oral or otherwise--upon which reliance is to be placed as involving [the accused's] consciousness of facts and the operations of his mind in expressing it, the demand upon him is not a testimonial one."

Even the question concerning defendant's sixth birthday was not designed to obtain testimonial evidence. Rather, its purpose was to obtain demonstrative, circumstantial evidence of defendant's physical condition. In other words, the question was not designed to obtain evidence which would be used to prove the truth of the matter asserted, i.e. the date of defendant's sixth birthday, but to demonstrate his inability to calculate that date. The question asked the defendant to demonstrate

the physiological functioning of his brain in much the same way as other sobriety tests demonstrated the functioning of his motor skills. As discussed previously, that type of communication is truly demonstrative rather than testimonial in nature and should not come within the purview of the Fifth Amendment.

During the second phase of the videotaping process, the defendant was asked to perform field sobriety tests. The videotape contains defendant's questions about how to perform the sobriety tests. Police conversation during the testing was merely to instruct defendant concerning performance of the tests and to determine whether the defendant understood the instructions. Again, these questions were not designed to provoke substantively incriminating responses but, rather, were for the defendant's benefit. The questions kept the booking agents from erroneously concluding the defendant's intoxication prevented him from performing tests when his poor performance was actually

the result of his inability to understand the instructions. The propriety of the questioning in this case is accentuated by the fact that English was defendant's second language. It was, therefore, eminently reasonable for the booking agents to ascertain the defendant's understanding of the instructions.[5]

During the final stage of the videotaping, the defendant was advised of the Implied Consent Law and asked to take a breathalyzer test. After the Implied Consent Law was explained to the defendant, he was asked if he understood the law. After making several inquiries as to its content, he said that he did.

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[5] The decision of the courts below is in conflict with other state courts which have concluded that similar police conduct does not constitute interrogation. Palmer v. State, 604 P.2d 1106 (Alaska 1979); Commonwealth v. Mahoney, 400 Mass. 524, 510 N.E.2d 759 (1987); People v. Burhans, 166 Mich. App. 758, 421 N.W.2d 285 (1988); People v. Jacquin, 71 N.Y.2d 825, 522 N.E.2d 1026, 527 N.Y.S.2d 728 (1988).

In South Dakota v. Neville, 459 U.S. 553 (1983), this Court concluded that an individual's refusal to submit to a blood-alcohol test was admissible against him because it was not compelled--the state gave the individual the choice to submit to or refuse the test. That is precisely what happened in this case. Like the conversation during sobriety testing, the booking agent's conversation with the defendant during this portion of the processing was not contact calculated to evoke admissions. If the defendant failed to understand the Implied Consent Law, he could not intelligently refuse to submit to the breath test. It is absurd to think that the police cannot ask a person if he understands the law without violating his Miranda rights. In order to help the defendant realize his rights and obligations, the police must ascertain whether he requires further or repeated instructions. Inasmuch as the booking agent's questions were not calculated to, expected to, or likely to evoke

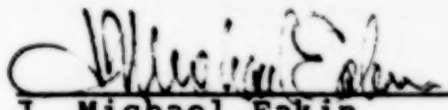
incriminating statements from the defendant, Miranda warnings were not required.

It was error for the Superior Court to conclude the entire audio portion of the videotape should have been suppressed when the defendant's statements were not the product of interrogation. A review of the videotape clearly reveals that the statements the Superior Court found incriminating were not compelled but were voluntary and not responsive to the questioning or conduct of the booking agent.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully asks this Court to reverse the decision of the Superior Court of Pennsylvania. This Court should hold that statements routinely made incident to field sobriety testing and booking procedures are not protected by the Fifth Amendment as they are neither testimonial in nature, nor compelled.

Respectfully submitted,



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NO. 89-213

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v

INOCENCIO MUNIZ,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

I. ARE RESPONDENT'S STATEMENTS, INCIDENT TO BOOKING AND FIELD SOBRIETY TESTING, TESTIMONIAL NOT DEMONSTRATIVE, PREVENTING THEIR ADMISSION AT TRIAL WHEN *MIRANDA* WARNINGS WERE NOT GIVEN?

II. DO THE INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS POSED TO RESPONDENT DURING FIELD SOBRIETY TESTING AND BOOKING CONSTITUTE INTERROGATION WITHIN THE PURVIEW OF THE *MIRANDA* DOCTRINE?

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STATEMENT OF THE CASE

Respondent accepts the facts as stated by Petitioners except as modified, explained or supplemented. The evidence at trial included the following.

In the early morning hours of November 30, 1986, Officer David Spotts of the Upper Allen Township Police Department observed a vehicle parked on the berm of U.S. Route 15 with its engine running and emergency flashers activated. The driver was Inocencio Muniz. (J.A. 12-13).

The officer detected a strong odor of alcohol emanating from Muniz's breath. He also observed that Muniz's eyes were bloodshot, and he noted poor coordination. Officer Spotts then directed Muniz to remain along the roadside until he was in a condition to operate his vehicle safely. (J.A. 13-14).

As Officer Spotts was returning to his car, Muniz's vehicle pulled back onto the highway. The patrolman pursued and pulled Muniz over. (J.A. 14-15). The officer

then requested Muniz's license and registration cards. Muniz fumbled through his wallet, dropping several cards, and eventually provided his Social Security card and U.S. Department of Agriculture farm labor card. After a second request, Muniz produced the proper identification. (J.A. 16-18).

Officer Spotts then asked Muniz to perform several field sobriety tests: the horizontal gaze nystagmus test, the "walk and turn" test, and finally, the "one leg stand" test. Muniz failed each of these tests, according to Officer Spotts. During these tests, Muniz admitted he had been drinking, that he was drunk, and that he could not perform the tasks required because he was too inebriated. Muniz was then arrested and transported to the Cumberland County Central Booking Center. (J.A. 19-21).

At the Booking Center, Muniz was video-taped, beginning at 3:54 a.m. (Pet. App. B15). Initially Muniz was advised of the identity

of the booking officer and that his actions and voice were being recorded by way of a video camera and recorder. Muniz was not advised of the Miranda warnings at this time. (State's Ex. 2; J.A. 26-29).

At 3:57 a.m., the booking officer asked Muniz his name and address. In order to provide his address, Muniz had to look in his wallet and produced a card with the address on it. Muniz was asked his height, weight, eye color, and date of birth. Upon providing said information, with a date of birth of April 19, 1947, Muniz was asked his current age. He responded that he was age forty-nine. Then he laughed and said, "I mean thirty-nine", and hit his head with his hand. (State's Ex. 2; J.A. 26-29).

Next, he was asked the date of his sixth birthday. After Muniz proved unable to calculate this date, the booking officer administered the three field sobriety tests previously performed at roadside. (Pet.

App. B16). During the "walk and turn" test, Muniz was required to count out loud his steps from one to nine. While performing the "one leg stand" test, Muniz was requested to count out loud to thirty. (State's Ex. 2; J.A. 26-29).

During the entire course of these tests, Muniz attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform. At approximately 4:18 a.m., the Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547 (Purdon Supp. 1989), was read to Muniz. He made several unfocused and vague inquiries concerning the import of the Implied Consent Law, and commented upon his state of inebriation and the probable legal implications of his actions. Muniz declined to submit to the breath test. Afterwards, at 4:29 a.m., Muniz was issued his Miranda warnings for the first time since his arrest. (Pet. App. B16; State's

Ex. 2; J.A. 26-29).

Respondent was convicted of Driving Under the Influence of Alcohol, 75 Pa. Cons. Stat. Ann. § 3731 (Purdon Supp. 1989). In reversing the Judgment of Sentence, the Pennsylvania Superior Court held that when the physical nature of field sobriety tests begins to yield testimonial and communicative statements, the protections afforded by Miranda are invoked. (Pet. App. B10).

The Court ruled that Muniz's entire responses during the booking process, his inquiries concerning the meaning of the implied consent law and comments upon his state of inebriation and the probable legal implications of his actions, were all testimonial and within the protections afforded by the Fifth Amendment. (Pet. App. B10).

The Court concluded that none of Muniz's utterances were spontaneous voluntary verbalizations, but rather were compelled by the questions and instructions presented to

him. (Pet. App. B12). The Superior Court held that since Muniz's responses and communications were elicited before he received Miranda warnings, they should have been excluded as evidence, and granted Muniz a new trial. (Pet. App. B17-18).

SUMMARY OF ARGUMENT

I.

The Fifth Amendment protects an accused from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature. "Testimonial" has been defined as an accused's oral or written communication, or act, which itself, explicitly or implicitly relates a factual assertion or discloses information. When statements of an accused are used, not for the content of what was said, but to interpret a suspect's mental state, said utterances are communicative and protected.

An element of the offense of Driving Under the Influence of Alcohol is mental impairment. In the case at bar, Muniz's utterances were offered by the Commonwealth to disclose the contents of his mind as to his ability to comprehend, reason, and calculate. As a result, the Pennsylvania

Superior Court correctly ruled that Muniz's responses at the Booking Center were testimonial.

II.

The privilege against self-incrimination applies only to custodial interrogation. Any form of direct questioning while in custody constitutes interrogation, even if an incriminating response is not intended. The videotape depicted express questioning of Muniz and, therefore, he was subject to interrogation requiring Miranda warnings.

Even if the protection of Miranda were limited to questions, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response, Muniz's responses remain inadmissible. The booking center procedure to which Muniz was subjected went far beyond that normally attendant to arrest and custody. The process was designed to gather evidence as to his mental and physical state to support prosecution.

The question asking Muniz to calculate his sixth birthday clearly exposes the Commonwealth's investigative intent. Police may not use routine biographical questioning as a guise for obtaining incriminating information, and answers to such questions are inadmissible without prior administration of the Miranda rights.

Moreover, the booking center authorities should have known their words and actions were reasonably likely to elicit incriminating responses particularly in light of the arresting officer's prior observations, causing him to believe Muniz was intoxicated, and Muniz's answers to the initial questions posed.

As a result, Muniz was impermissibly interrogated without being advised of his Miranda warnings and his utterances were correctly ruled inadmissible.

ARGUMENT

I. RESPONDENT'S STATEMENTS, INCIDENT TO BOOKING AND FIELD SOBRIETY TESTING, ARE TESTIMONIAL NOT DEMONSTRATIVE, PREVENTING THEIR ADMISSION AT TRIAL WHEN MIRANDA WARNINGS WERE NOT GIVEN.

The Pennsylvania Superior Court correctly ruled that Muniz's responses to initial questioning at the Booking Center, statements during the physical sobriety tests, and questions and comments about the Pennsylvania Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547, were testimonial, because they were in response to questions and instructions by authorities that elicited information revealing Muniz's thought processes. (Pet. App. B10, 12, 14-15, 17).

The Fifth Amendment privilege protects an accused from being compelled to testify against himself, or otherwise provide evidence of a testimonial or communicative nature. Schmerber v California, 384 U.S. 757, 761 (1966). Compulsion which makes an accused

the source of real or physical evidence does not violate the privilege. Id. at 764.

The fact that the accused is forced to utter words does not, in itself, constitute self-incrimination. Recordings of an accused's voice are permissible if they are used solely to measure the physical properties of the voice, not for the testimonial or communicative content of what was said. United States v Dionisio, 410 U.S. 1, 7 (1973). Similarly, requiring the uttering of words in a lineup, for purposes of identification rather than as a way of eliciting testimony, does not violate the Fifth Amendment. United States v Wade, 388 U.S. 218, 222-23 (1967).

This Court has defined "testimonial" as an accused's oral or written communication, or act, which itself, explicitly or implicitly, relates a factual assertion or discloses information. Doe v United States, 108 S. Ct. 2341, 2342 (1988). It is the extortion of information from the accused, the attempt

to force him to disclose the contents of his own mind that implicates the Self-Incrimination Clause. Id. at 2348. The relevant inquiry is whether a suspect is required to "speak his guilt." In re Special Fed. Grand Jury, 809 F.2d 1023, 1026 (3d Cir. 1987).

However, the concept of verbal communication is not limited to direct confessions of guilt. Verbal communication is also the use of words to impart or transmit information. Walker v Butterworth, 599 F.2d 1074, 1082 (1st Cir.), cert. denied, 444 U.S. 937 (1979); Tyars v Finner, 518 F. Supp. 502, 509-10 (C.D. Cal. 1981). When words reveal the accused's mental process of thought, they are testimonial. Doe, 108 S. Ct. at 2347; Walker, 599 F.2d at 1082.

The question as to whether a compelled communication is testimonial for Fifth Amendment purposes depends on the facts and circumstances of the particular case. Doe, 108 S. Ct. at 2350. As this Court recognized, some seemingly

physical evidence, such as lie detector tests, measuring changes in bodily function during interrogation, may actually be directed to eliciting responses which are essentially testimonial because an effort is made to determine guilt or innocence based upon physiological responses to questioning. Schmerber, 384 U.S. at 764.

Handwriting exemplars normally are not protected by the privilege against self-incrimination, since they involve an identifying physical characteristic outside its protection. Gilbert v California, 388 U.S. 263, 266-67 (1967). However, a handwriting exemplar requiring a suspect to take dictation, thereby being forced to choose the spelling of the words, has been ruled to be testimonial within the protection of the Fifth Amendment. United States v Campbell, 732 F.2d 1017, 1021 (1st Cir. 1984).

The Campbell court reasoned:

> When he writes a dictated word, the writer is saying, 'This is how I spell it,' - a testimonial

> message in addition to the physical display. If a defendant misspelled a common word, and the document sought to be attributed to him misspelled it the same way, could it be thought that the government would not . . . argue that there was a message?

Id. (citation omitted).

The crime of Driving Under the Influence of Alcohol is unusual, as an element of the offense is the suspect's mental condition, or state of mind. 75 Pa. Cons. Stat. § 3731; Commonwealth v Griscavage, 512 Pa. 540, 544-45, 517 A.2d 1256, 1258 (1986). In order to establish guilt, the Commonwealth had to prove Muniz was driving under the influence of alcohol to a degree which rendered him incapable of safe driving. 75 Pa. Cons. Stat. § 3731. The phrase "under the influence of alcohol" has been interpreted by the Pennsylvania Supreme Court to include:

> not only all the well known and easily recognized conditions and degrees of intoxication, but also any mental or physical condition

> which is the result of drinking alcoholic beverages and (a) which makes one unfit to drive an automobile, or (b) which substantially impairs his judgment, or clearness of intellect, or any of the normal faculties essential to the safe operation of an automobile.

Griscavage, 512 Pa. at 545, 517 A.2d at 1258 (citation omitted).

"Substantial impairment", in this context, means a diminution or enfeeblement in the ability to exercise judgment, to deliberate, or to react prudently to changing circumstances and conditions. Id.

When statements of an accused are used, not for the testimonial content of what was said, but to interpret mental state, which is at issue, said utterances are communicative and protected by the Fifth Amendment. Estelle v Smith, 451 U.S. 454, 463-65 (1981) (defendant's account of a crime and statements to a psychiatrist used, not for testimonial content of what was said, but to interpret his mental state concerning future dangerousness, were communicative and protected);

Walker, 599 F.2d 1074 (requirement that defendant personally exercise preemptory challenges in presence of jurors in case involving insanity defense revealed defendant's mental thought processes and was testimonial); Tyars, 518 F. Supp. 502 (petitioner's words offered not for their stated content but to show his mental condition and dangerousness were testimonial and protected).

In the case at bar, Muniz's videotaped utterances were offered by the Commonwealth to disclose the contents of his mind as to his ability to comprehend, reason, and calculate, in hopes of establishing intoxication. (State's Ex. 2; J.A. 26-29); Garner v State, ___ S.W.2d ___, No. 2-87-079-CR, p. 34 (Tex. Ct. App. October 12, 1989). It cannot be argued that the ability to know and recite the next number in a sequence, i.e., counting, or to calculate the date of one's sixth birthday merely measures physical ability to speak. Indeed, the ability to count, or calculate a date, depends on the individual's

mental ability to recall and reason and has nothing at all to do with physical ability. Commonwealth v Conway, 368 Pa. Super. 488, 498-99, 534 A.2d 541, 546-47 (1987), allocatur denied, 520 Pa. 581, 549 A.2d 914 (1988); Commonwealth v Bruder, 365 Pa. Super. 106, 528 A.2d 1385, 1388 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, rev'd on other grounds sub nom., Pennsylvania v Bruder, 109 S. Ct. 205 (1988).[1]

Likewise, Muniz's responses seeking clarification of instructions for the field sobriety tests and the Implied Consent Law were not offered into evidence to show Muniz's physical ability to speak, or even to show he understood the instructions, but rather, they

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[1] In light of the foregoing, even if this Court were to rule voice exemplars, compelled from a suspect to show physical inability to speak clearly, are not within the purview of the Fifth Amendment, Muniz's utterances would not be admissible because they contain the above-said testimonial components in addition to exhibiting the physical method of speech. It is impossible to distinquish and exclude the testimonial components of Muniz's responses from his physical method of speech. United States v Hinckley, 672 F.2d 115, 126 (D.C. Cir. 1982).

were offered to show Muniz's mental confusion and inability to comprehend, remember, and execute instructions, in short, to show the state of Muniz's mind. Commonwealth v Thompson, 377 Pa. Super. 598, 606, 547 A.2d 1223, 1227 (1988); Commonwealth v Waggoner, 373 Pa. Super. 23, 29, 540 A.2d 280, 283, allocatur denied, ___ Pa. ___, 554 A.2d 509 (1988), cert. denied, 109 S. Ct. 1769 (1989); Conway, 368 Pa. Super. at 498-99, 534 A.2d at 546-47.[2]

As this Court stated in Miranda:

> No distinction can be drawn between statements which are direct confessions and statements which amount to 'admissions' of part or all of

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[2] The National Highway Traffic Safety Administration (NHTSA) training manual, in describing the procedures for field testing, states: "[b]e sure to mention that part of your evaluation will be based upon how well he follows instructions and performs exactly as demonstrated." U.S. Dep't of Transp., Improved Sobriety Testing, US DOT-NHTSA HS-0806512 (Aug. 1989), reprinted in 1 R. Erwin, M. Minzer, L. Greenberg and H. Goldstein, Defense of Drunk Driving Cases § 8A.99, at 8A-43 (3d ed. 1989).

> an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution.

Miranda v Arizona, 384 U.S. 436, 476-77 (1966).

As a result, the Pennsylvania Superior Court correctly ruled Muniz's videotaped utterances to be testimonial and protected by the Fifth Amendment. Doe, 108 S. Ct. at 2342; Estelle, 451 U.S. at 463-65.[3] The Self-Incrimination Clause reflects a judgment that the prosecution should not be free

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[3] Other state courts which have reached similar results include: Thompson v People, 181 Colo. 194, ___, 510 P.2d 311, 315 (1973); Commonwealth v Brennan, 386 Mass. 772, ___, 438 N.E.2d 60, 63 (1982); State v Breeden, 374 N.W.2d 560, 562 (Minn. Ct. App. 1985); State v Strickland, 276 N.C. 253, ___, 173 S.E.2d 129, 134 (1970); Delgado v State, 691 S.W.2d 722, 723 (Tex. Crim. App. 1985).

to build a criminal case, in whole or in part, with the assistance of enforced disclosures of the accused. Doe, 108 S. Ct. at 2348. As this Court stated: "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." Schmerber, 384 U.S. at 762.

II. THE INSTRUCTIONS, CLARIFICATIONS AND BACKGROUND QUESTIONS POSED TO RESPONDENT DURING FIELD SOBRIETY TESTING AND BOOKING CONSTITUTED INTERROGATION WITHIN THE PURVIEW OF THE MIRANDA DOCTRINE.

In Miranda, this Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444.

The privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will. Id. at 460. Accordingly, statements of an accused during custodial interrogation must be preceded by the warnings set forth in Miranda. Id. at 479.

This Court in Miranda defined "interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." Id. at 444. If police ask a suspect in custody express questions without giving Miranda warnings, the responses cannot be introduced to establish guilt. Berkemer v McCarty, 468 U.S. 420, 429 (1984).[4] Any form of direct questioning while in custody constitutes interrogation, even if an incriminating response is not intended. United States v Downing, 665 F.2d 404, 406 (1st Cir. 1981); Proctor v United States, 404 F.2d 819, 820-21 (D.C. Cir. 1968).

In the case at bar, the videotape depicts the following express questioning. The booking officer asked Muniz his name, address, height, weight, eye color, and date of birth.

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[4] Petitioner concedes Muniz was in custody at the booking center, as it must. (Pt. B. 17). Muniz had been formally arrested, handcuffed and transported in the back of the police car to the Booking Center, where he was further detained. (J.A. 19-21); Berkemer, 468 U.S. at 440.

Upon providing said information, Muniz was asked his current age. Next, he was asked the date of his sixth birthday. (State's Ex. 2; J.A. 26-29). The booking officer then administered the field sobriety tests. (Pet. App. B16). During the "walk and turn" test, Muniz was required to count out loud his steps from one to nine. While performing the "one leg stand" test, Muniz was requested to count out loud to thirty. Muniz was also asked if he understood the instructions. (State's Ex. 2; J.A. 26-29). The Implied Consent Law, 75 Pa. Cons. Stat. Ann. § 1547, was then read to Muniz and he was asked several times if he understood. (State's Ex. 2; J.A. 26-29; Pet. App. B10).

The Pennsylvania Superior Court found as a matter of fact that "none of Muniz's utterances were spontaneous, voluntary verbalizations. Rather they were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center . . . ." (Pet. App. B17).

When police ask questions of a suspect in custody without administering the required warnings, Miranda dictates an irrebuttable presumption of compulsion. Oregon v Elstad, 470 U.S. 298, 306-07 (1985). As this Court stated in Miranda:

> We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Miranda, 384 U.S. at 461 (footnote omitted).

Because he was expressly questioned, as set forth above, Muniz was subject to "interrogation" requiring Miranda warnings. See Berkemer, 468 U.S. at 429, 434.

In Rhode Island v Innis, 446 U.S. 291 (1980), this Court expanded the Miranda

definition of "interrogation" to include express questioning or its functional equivalent. "Interrogation" was defined as

> not only . . . express questioning, but also . . . any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.

Id. at 301.

Petitioner argues that utterances made in response to "routine booking questions," not designed to elicit an incriminating response, do not constitute "interrogation" as defined above and Miranda warnings are not required. (Pt. B. 19-22). However, the limitation set forth in Innis was not applied to direct questioning, but only to its functional equivalent. Innis, 446 U.S. at 300-01; Downing, 665 F.2d at 407. See also Berkemer, 468 U.S. at 429.[5]

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[5] South Dakota v Neville, 459 U.S. 553 (1983), is inapposite to the case at bar since the decision, that refusal to take a blood alcohol test is not protected by the privilege against self-incrimination,

If this Court were to apply the aforesaid limitation to express questioning, the protection against self-incrimination to an accused would be substantially eroded. Such "routine" information may provide crucial evidence, as in this case. It is a substantial dilution of the principals of Miranda to expect an individual, shaken by his arrest, ignorant of his right to eschew conversation with police, and without benefit of counsel, to make a careful, considered choice based upon the probable consequences of responding to seemingly innocent questions and instructions. See Berkemer, 468 U.S. at 433; Miranda, 384 U.S. at 455, 461, 467-72.

In the instant case, Muniz was asked questions which on their face appeared to be benign attempts to gather statistical data and insure he understood the physical sobriety tests. (State's Ex. 2; J.A. 26-29).

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was based upon a finding of no impermissible coercion encouraging a refusal. It did not reach the issue of whether interrogation occurred in that context. Id. at 562.

Without being given Miranda warnings, Muniz could not have been expected to recognize his responses would be used against him and offered into evidence in an effort to show the intoxicated state of his mind. Therefore, he could not make an intelligent, voluntary choice to speak freely, or to exercise his right against self-incrimination by speaking as little as possible and not answering some or all of the inquiries posited to him.[6]

One of the principal advantages of the Miranda doctrine is its clarity. As this Court opined: "Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and

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[6] Requiring Miranda warnings for all custodial questioning, would not prevent police from obtaining biographical information, asking a suspect if he understood instructions or the Implied Consent law, 75 Pa. Cons. Stat. Ann. § 1547. Rather, it would simply prevent responses to these inquiries from being used in the prosecution's case in chief against the defendant.

of informing courts under what circumstances statements obtained during such interrogation are not admissible." Berkemer, 468 U.S. at 430 (citation omitted).

If an exception were carved out for booking questions, the litigation necessary to resolve whether a question was a routine booking question, or something more, would be time-consuming and disruptive. Instead of the bright line rule of Miranda, the end result would be an elaborate set of rules, with a multitude of exceptions and subtle distinctions, discriminating between different kinds of custodial questioning. Id. at 432.

Exclusion of administrative questioning from the protections of Miranda, would place a premium on the ingenuity of police to devise indirect methods of interrogation disguised as booking or other administrative questioning, such as the "sixth birthday" question in this case, rather than to implement

the protections of Miranda. See Estelle, 451 U.S. at 466; Innis, 446 U.S. at 299.

Even if this Court were to limit the protection of Miranda only to questions, other than those normally attendant to arrest and custody, that police should know are reasonably likely to elicit an incriminating response, Muniz's responses remain inadmissible. The questions and instructions posited to Muniz went far beyond those normally attendant to arrest and custody. Muniz was not merely asked his identity, to submit to fingerprinting and photographing and requested to take a blood-alcohol test. See Neville, 459 U.S. at 564 n.15. Rather he was subjected at the booking center to a process designed to gather evidence as to his mental and physical state in support of the expected prosecution. (Pet. App. B15).

The very fact that the "biographical" questioning of Muniz was recorded, indicates

a purpose beyond that of gathering routine information, especially since it had been previously obtained. Jones v State, 745 S.W.2d 94, 96 (Tex. Ct. App. 1988). It was the testimony of the booking officer, Terry Hosterman, at the suppression hearing, that Muniz had already been asked the necessary booking information before his videotaped responses:

> Q Starting with when you first had contact with the defendant, would you explain how you processed him?
>
> A Well, we take the initial questions, name, date of birth, so forth, the arresting officer. And then he is brought into the room in front of the video camera and the processing is started.

(R. Omnibus Pretrial Motion Hearing, 5/1/87, p. 12).

Moreover, the arresting officer, Spotts, had obtained most, if not all, of the necessary information for booking at the scene of the original traffic stop. (J.A. 18). Surely the authorities did not videotape

said matters simply to have another record of the responses.

Upon providing his date of birth, Muniz was asked to calculate his current age. (State's Ex. 2; J.A. 26-29). Having obtained a date of birth, it was unnecessary to also require the defendant to calculate his age. Muniz was then asked to calculate the date of his sixth birthday, (Pet. App. B16), which Petitioner acknowledges was not for the purpose of identifying information. (Pt. B. 19-21).

Most of the remainder of Muniz's utterances occurred in response to questions and instructions posed during the physical coordination tests. These tests, by their very nature, were designed to gather incriminating evidence of a suspect's physical condition. (Pt. B. 21-22). This cannot be argued to be a situation at all related to a simple request for identity or fingerprinting, photographing or other routine processing upon arrest. Hinckley,

672 F.2d at 122-23; Jones, 745 S.W.2d at 96. If the situation in this case were deemed to be normally attendant to arrest and custody, any procedure devised by police to gather incriminating responses from suspects, routinely and uniformly done as a matter of course in all cases upon arrest would likewise be beyond the protections of the Fifth Amendment.

Police may not use routine biographical questioning as a guise for obtaining incriminating information. Robinson v Percy, 738 F.2d 214, 220 (7th Cir. 1984); United States v Avery, 717 F.2d 1020, 1024-25 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); United States v Glen-Archila, 677 F.2d 809, 816 (11th Cir.), cert. denied, 459 U.S. 874 (1982); Hinckley, 672 F.2d at 123-26; United States v Booth, 669 F.2d 1231, 1238 (9th Cir. 1982); Downing, 665 F.2d at 407. If investigative questions are asked while routine information is being obtained, answers

to such questions are inadmissible if the suspect has not been given his Miranda rights. Even questions that usually are routine must be preceded by Miranda warnings if they are intended to produce answers that are incriminating. Glen-Archila, 677 F.2d at 816.

Hinckley addressed a situation similar to the case at bar. In that case, the FBI conducted a twenty-five minute "background" interview of the suspect in a presidential assassination attempt. The agents posed questions to Hinckley concerning his name, physical characteristics, family, educational background, employment history, health, and travel patterns. Hinckley, 672 F.2d at 121. The government argued that said questions were not designed to elicit an incriminating response. However, the Court held that since the agents were aware of the likelihood of an insanity defense, and the questions were relevant to the accused's mental state,

said interview was designed to elicit incriminating responses. Id. at 124-25.

In the case at bar, where Muniz's mental state was at issue, the questions and instructions posited similarly had an obvious investigative intent entwined within. Garner, ___ S.W.2d at ___ No. 2-87-079-CR, p. 34 (Tex. Ct. App. October 12, 1989). The "sixth birthday" question, is the "smoking gun" in this matter, clearly and unambiguously exposing the Commonwealth's investigative intent. Hinckley, 672 F.2d at 124-25. No plausible explanation can be offered for this question beyond the intention of gathering an incriminating response. (Pt. B. 20).

In any event, even when questioning is not asked in an attempt to elicit evidence of a crime, it may still constitute interrogation. Booth, 669 F.2d at 1238. The factual setting of the encounter must be carefully scrutinized. Even a relatively innocuous series of questions, may, in light of the factual circumstances,

be reasonably likely to elicit an incriminating response. Avery, 717 F.2d at 1025; See Downing, 665 F.2d at 407. The ultimate test is whether, in light of all the circumstances, the authorities should have known that a question was reasonably likely to elicit an incriminating response. Booth, 669 F.2d at 1238.

The authorities should have known their words and actions were reasonably likely to elicit incriminating responses from Muniz. During the initial roadside stop, Officer Spotts claimed to have observed a strong odor of alcohol, bloodshot eyes, and poor coordination. (J.A. 13-14). Muniz had trouble producing his driver's license and registration, (J.A. 16-18), and, in the opinion of the officer, had failed three roadside sobriety tests. Administration of these tests prompted incriminating verbal responses from Muniz. (J.A. 19-21). Officer Spotts believed Muniz to be intoxicated.

(J.A. 14). As a result, the law enforcement authorities knew any question or instruction posited to Muniz at the booking center was reasonably likely to elicit an incriminating response.

During the initial videotaped questioning, Muniz had to look in his wallet and obtain a card to provide his address, upon request. Upon providing his date of birth Muniz was asked his current age, which he incorrectly calculated. (State's Ex. 2; J.A. 26-29). Even if none of Officer Spotts' observations are imputed to the booking center personnel, at this point in the questioning, the officer should have known any response from Muniz was reasonably likely to elicit an incriminating response.

Nonetheless, Muniz was next asked to calculate the date of his sixth birthday, which he could not do. (Pet. App. B16). Based upon Muniz's preceding answers, the booking officer should have known the "sixth birthday" question and all questions and

comments thereafter were reasonably likely to elicit an incriminating response. See Robinson, 738 F.2d at 220; Downing, 665 F.2d at 407; Jones, 745 S.W.2d at 96.

As a result, Muniz was impermissibly interrogated without being advised of his Miranda warnings and his utterances were correctly ruled inadmissible.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court of Pennsylvania should be affirmed.

Respectfully submitted,

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No. 89-213

In the Supreme Court of the United States

OCTOBER TERM, 1989

COMMONWEALTH OF PENNSYLVANIA, PETITIONER

v.

INOCENCIO MUNIZ

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA, MIDDLE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a videotape of respondent being booked, taking certain sobriety tests, and refusing to take a breath test was properly admitted, even though respondent had not been advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

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INTEREST OF THE UNITED STATES

The United States has an interest in this case because the question whether particular evidence is testimonial arises frequently in federal criminal prosecutions. In addition, the federal government has an interest in sobriety testing and videotaping drunk driving suspects. The National Highway Traffic Safety Administration, part of the Department of Transportation, has distributed manuals advising local police departments on the conduct of field sobriety tests. With the Department's approval, many local police departments have used federal funds provided under 23 U.S.C. 402 (1982 & Supp. V 1987) to purchase equipment for videotaping sobriety tests. Finally, the decision in this case will have a direct impact on federal law enforcement efforts,

as it will determine whether officers who make drunk driving arrests on federal property may videotape subjects taking sobriety tests in order to secure reliable and graphic evidence of the subjects' condition at the time of arrest.

STATEMENT

1. At 2:50 a.m. on November 30, 1986, a police officer on patrol in Cumberland County, Pennsylvania, saw a car stopped on the side of the road with its hazard lights flashing. Respondent was sitting in the driver's seat, and a passenger was sitting beside him. The officer stopped and asked if he could be of assistance, but respondent said that he had just stopped to urinate. The officer smelled alcohol on respondent's breath and warned him to sober up before driving. Respondent said that he would stay on the side of the road until he could drive safely. As the officer was returning to his patrol car, however, respondent drove away. Pet. App. B1-B3, C3-C4.

The officer followed respondent and pulled him over after respondent had driven about half a mile. When respondent had difficulty producing his driver's license, the officer administered three sobriety tests on the side of the road—the horizontal gaze nystagmus test, the "walk and turn" test, and the "one leg stand" test.[1] Respondent failed each of

[1] The National Highway Traffic Safety Administration (NHTSA) recommends the administration of these three tests. See U.S. Dep't of Transp., *Improved Sobriety Testing*, US DOT-NHTSA HS-0806512 (Aug. 1989), *reprinted in* 1 R. Erwin, M. Minzer, L. Greeberg & H. Goldstein, *Defense of Drunk Driving Cases* § 8A.99, at 8A-42 to 8A-51 (3d ed. 1989). As the NHTSA manual explains, the horizontal gaze nystagmus test measures "the jerking of the eyes as they gaze to the side." *Id.* at 8A-43. Everyone exhibits some jerking of the eyes upon looking to the side, but in the case of intoxicated persons "the onset of the jerking occurs after fewer degrees of turning, and the jerking at more extreme angles becomes more distinct." *Id.* at 8A-43, 8A-45. The "walk and turn" test requires the subject to walk heel-to-toe along a straight line for nine paces, turn, and walk heel-to-toe along the line again for nine paces. *Id.* at 8A-46. The "one leg stand" test requires the subject to stand on one leg for 30 seconds. *Id.* at 8A-48. As would be expected, persons who are intoxicated often have difficulty performing the walk and turn and one leg stand tests.

the tests. He told the officer that he could not perform the various tasks because he was too inebriated. Pet. App. B3-B4.

The officer then took respondent to the Cumberland County Central Booking Center. In accordance with its standard procedure in drunk driving cases, the Booking Center videotaped the proceedings there. An officer at the Booking Center first asked respondent his name, address, height, weight, eye color, date of birth, and current age. The officer then asked respondent the date of his sixth birthday. When respondent was unable to calculate that date, the officer administered the same three sobriety tests that respondent had performed on the side of the road. Pet. App. B15-B16. While performing the tests, respondent "attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform." *Id.* at B16. An employee at the Booking Center then explained Pennsylvania's Implied Consent Law to respondent and sought to check his blood alcohol level by a breath test.[2] After asking a number of questions about the Pennsylvania law, respondent refused to take the breath test. He was then advised of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. B15-B16, C6.

2. The videotape showing the booking, the administration of the sobriety tests, and petitioner's refusal to take the breath test was admitted into evidence at respondent's bench trial. Testimony relating to the sobriety tests ad-

[2] Under that law, 75 Pa. Cons. Stat. Ann. § 1547 (Purdon 1977), individuals driving on Pennsylvania roads are deemed to have consented to have their blood alcohol level checked.

ministered on the side of the road was aiso admitted. Pet. App. C5-C6. Respondent was convicted of driving under the influence of alcohol. As a repeat offender, he was sentenced to imprisonment for not less than 45 days nor more than 23 months. Pet. App. D2.

Respondent filed a motion for a new trial, arguing that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the Booking Center, "because they were incriminating and completed prior to [respondent's] receiving his Miranda warnings." Pet. App. C5-C6. The trial court denied the motion. It explained that "requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no Miranda warnings are required." *Ibid.* (quoting *Commonwealth* v. *Benson*, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980) (brackets in original)). The court added: "This would likewise hold true for the videotape of the defendant taken at the booking center, particularly where, as here, the defendant gave no incriminating statement; rather it was the defendant's actions that were incriminating." Pet. App. C6.

3. The Superior Court reversed by a 2-1 vote. Pet. App. B1-B20. At the outset, the court agreed with the trial court that, under *Schmerber* v. *California*, 384 U.S. 757 (1966), sobriety tests elicit physical evidence rather than testimonial evidence, so that the Fifth Amendment does not bar the government from compelling suspects to take such tests. Accordingly, the court held that when respondent was asked "to submit to a field sobriety test, and later perform these tests before the videotape camera, no *Miranda* warnings were required." Pet. App. B9-B10. The court concluded, however, that "when the physical nature of the tests begins to yield testimonial and communicative statements • • •

the protections afforded by *Miranda* are invoked." *Id.* at B10.

The Superior Court held that during the booking process respondent "was subjected to questioning that elicited information revealing his thought processes." Pet. App. B15. In addition, the court held that "the questions posited by [respondent] during his on-camera physical sobriety tests" constituted testimonial evidence that should not have been admitted at trial. *Id.* at B17. The court further held that respondent's statements, including his responses to the booking questions, his comments while taking the sobriety tests, and his questions about the Pennsylvania implied consent law, "were clearly compelled by the questions and instructions presented to him during his detention at the Booking Center." *Ibid.* Finally, the court held that respondent's videotaped responses "were clearly prejudicial, and certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." *Id.* at B17-B18. The court therefore concluded that respondent must be granted a new trial.

The dissenting judge concluded that most of the disputed evidence was not testimonial and therefore did not have to be excluded at trial. According to the dissenting judge, "the only inadmissible evidence was the police officer's request that [respondent] calculate the date of his sixth birthday." In light of the other evidence of respondent's guilt, the dissenting judge would have found the "sixth birthday" evidence insufficiently prejudicial to require reversal of the conviction. Pet. App. B20.

The Pennsylvania Supreme Court denied the Commonwealth's application for review. Pet. App. A1-A2.

SUMMARY OF ARGUMENT

The videotape of respondent's activities at the Booking Center was admissible because it was not the product of custodial interrogation. Much of what respondent said and did at the Booking Center was not in response to questioning at all. Moreover, his statements and actions were admitted for the purpose of showing his condition at the time, not to exploit any admissions concerning his crime. There is no question that police officers could testify, based on observations made during the booking process, that the defendant was confused and that his speech in response to routine processing questions was slurred. Since a videotape merely provides better evidence for the trier of fact to determine whether the defendant's manner of functioning indicates that he was drunk, there is no reason to withhold it from the trier of fact.

1. Statements made by criminal suspects during custodial interrogation may not be introduced unless the suspects have been advised of and have waived their right to remain silent and their right to the presence of counsel at the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). That principle, however, does not bar the police from asking routine processing questions while booking a suspect and using the suspect's answers against him if the answers turn out to be incriminating. The booking process is far removed from the kind of custodial interrogation that the Court was concerned with in *Miranda*. Booking is an administrative process, not part of the investigation of crime. It is essential for the police to obtain basic identification information about the suspect they are taking into custody. Booking is not designed to elicit incriminating admissions, and it is normally brief and non-coercive in nature. Because none of the concerns that underlay the Court's decision in *Miranda* are presented in the booking process, the exclu-

sionary rule of *Miranda* should not be extended to that setting.

2. The question about the date of respondent's sixth birthday was asked during booking, but it was not a routine booking question. Instead, it was a sobriety test. The purpose of the question was not to elicit information or an admission, but to determine whether respondent could perform a simple arithmetic calculation. Because the question was not designed to elicit a testimonial response, it did not constitute custodial interrogation within the meaning of *Miranda*. For that reason, the trial court properly admitted the portion of the videotape showing that respondent was unable to calculate the date of his sixth birthday.

3. The Fifth Amendment does not prohibit the police from compelling suspects to produce demonstrative evidence, such as a blood sample or a voice exemplar. Accordingly, the police did not err by administering the sobriety tests at the Booking Center and asking respondent to take the breath test without advising him of his right to remain silent and his right to counsel, and obtaining a waiver of those rights. Indeed, the court below acknowledged that no *Miranda* warnings were required before the police sought to determine whether respondent's performance was impaired. Pet. App. B10.

4. The same analysis applies to the statements respondent made while taking the sobriety tests and refusing to take the breath test. The fact that the audio portion of the videotape contains statements made by respondent does not make the evidence testimonial. This Court has held that a defendant may be compelled to utter the words a robber spoke and produce a voice exemplar. *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Dionisio*, 410 U.S. 1 (1973). Those statements were demonstrative evidence rather than testimonial evidence: they were not admitted to prove the truth of any assertion that they contained, but

simply to show from the way the statements were made that respondent appeared to be drunk. It does not matter that, in addition to showing respondent's manner of speaking, the questions he asked indicated that he was confused. Although his confusion helped communicate the fact that he was drunk, so did the blood alcohol test that was upheld in *Schmerber* v. *California, supra*. What matters is that respondent was not asked to "speak his guilt." *Wade*, 388 U.S. at 223.

ARGUMENT

THE VIDEOTAPE OF RESPONDENT'S CONDUCT AT THE BOOKING CENTER, INCLUDING THE AUDIO PORTION, WAS PROPERLY ADMITTED INTO EVIDENCE

The Self-Incrimination Clause of the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." In *Schmerber* v. *California*, 384 U.S. 757 (1966), this Court held that a person suspected of drunk driving was not compelled to be a witness against himself when he was required to submit to a blood alcohol test and the results of that test were introduced at trial. The Court explained that the privilege against compelled self-incrimination "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature." *Id.* at 761. Compulsion that makes a suspect the source of "real or physical evidence" does not violate the Fifth Amendment, the Court noted. *Id.* at 764. Because a blood test does not require the suspect to make any testimonial admission, the Court held that the result of a blood test constitutes demonstrative evidence rather than testimonial evidence and is therefore admissible even if the blood test was conducted without the suspect's consent. *Id.* at 765.

In *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), the Court held that "the prosecution may not use statements

* * * stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The Court subsequently defined "interrogation" to mean "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980).

The decisions in *Schmerber* and *Miranda* have guided the lower courts in resolving questions arising from the videotaping of drunk driving suspects, which has become a common practice in recent years.[3] Videotapes permit the trier of fact to see and hear the best evidence relating to the crucial fact at issue in a drunk driving case: whether the defendant was impaired by alcohol at the time of his arrest. Note, *Self-Incrimination Issues in the Context of Videotaping Drunk Drivers: Focusing on the Fifth Amendment*, 10 Harv. J.L. & Pub. Pol'y 631, 632 (1987). While it is ordinarily the prosecutor who seeks to use the videotape,[4] that is not always the case. According to

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[3] "Federal grants to local police agencies under the Safe Streets Act have enabled many local police departments to purchase videotape equipment." 1 R. Erwin, M. Minzer, L. Greeberg & H. Goldstein, *Defense of Drunk Driving Cases* § 9.02, at 9-3 (3d ed. 1989). Booking facilities that videotape drunk driving suspects "usually include a room designated for that purpose with appropriate white lines drawn both on the floor and vertically on the walls so that the balance, sway, etc. of the suspect can readily be observed." *Ibid.*

[4] In many cases, videotape evidence convinces defendants to plead guilty. One town found that over a 12-month period 56 out of 57 defendants "decided to plead guilty to the charge rather than face their movie debut in court." Foote, *supra*, 10 Harv. J.L. & Pub. Pol'y at 637. Such evidence may also have a rehabilitative value, as some drivers see, "perhaps for the first time, how they actually look and function while

some defense attorneys, a defendant "will often find that a tape recording is advantageous to his case, rather than detrimental." 1 R. Erwin, M. Minzer, L. Greenberg & H. Goldstein, *Defense of Drunk Driving Cases* § 9.02, at 9-5 (3d ed. 1989). Those attorneys contend that police officers who testify at trial tend to exaggerate the degree of a defendant's impairment, and that a videotape will often show, for example, that the defendant's speech was not thick or slurred. *Ibid.*

A recent review of cases involving challenges to the admissibility of videotapes of drunk driving suspects concluded that "[a]ll [of] the states that have addressed the question since *Schmerber* • • • now appear to agree: The *visual* component of drunk driving tapes, at least, is *not* testimonial and hence does not violate the defendant's privilege against self-incrimination." Note, *supra*, 10 Harv. J.L. & Pub. Pol'y at 645-646; see, *e.g.*, *Delgado* v. *State*, 691 S.W.2d 722, 723 (Tex. Crim. App. 1985); *State* v. *Roadifer*, 346 N.W.2d 438, 440-441 (S.D. 1984); *Palmer* v. *State*, 604 P.2d 1106, 1109 (Alaska 1979). Some state courts, however, have suppressed the audio portion of videotapes, at least in part. In *Roadifer*, for example, the court held that the audio portion of a tape could be played to show the *manner* of a defendant's speech. But the court added that any admissions the defendant might have made should be redacted from the tape. 346 N.W.2d at 441.[5]

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inebriated," rather than how they "*imagine* they handle themselves while under the influence of liquor." *Id.* at 638.

[5] See also *Thompson* v. *People*, 181 Colo. 194, 202, 510 P.2d 311, 315 (1973) ("[t]he sound on the film had been ordered suppressed by the court because it revealed that defendant invoked his Fifth Amendment right to remain silent"); *State* v. *Strickland*, 276 N.C. 253, 262, 173 S.E.2d 129, 135 (1970) ("when the sound motion picture contains incriminating statements by the defendant • • • the judge must conduct a *voir dire* to determine the admissibility of the in-custody statements").

The court that has gone the farthest in foreclosing the use of videotaped evidence in drunk driving cases is the Superior Court of Pennsylvania. See 1 R. Erwin, M. Minzer, L. Greenberg & H. Goldstein, *supra*, § 9.03, at 9-18. In prior cases, that court has suppressed the audio portion of videotapes altogether when defendants have invoked their constitutional rights, *Commonwealth* v. *Conway*, 368 Pa. Super. 488, 534 A.2d 541 (1987), allocatur denied, 520 Pa. 581, 549 A.2d 914 (1988), and it has refused to admit evidence of the suspect's inability to recite the alphabet unless the suspect was previously advised of his *Miranda* rights and validly waived those rights. *Commonwealth* v. *Bruder*, 365 Pa. Super. 106, 114, 528 A.2d 1385, 1388 (1987), allocatur denied, 518 Pa. 635, 542 A.2d 1365, rev'd, 109 S. Ct. 205 (1988). In this case, the court held that statements made by the suspect while being booked, while taking sobriety tests, and while discussing with law enforcement officials whether he would submit to a breathalyzer test could not be admitted at trial absent *Miranda* warnings and a waiver of rights under *Miranda*.

The Pennsylvania court has misapplied *Miranda* and this Court's Fifth Amendment precedents. In this case, the police did not at any point during the proceedings at the Booking Center compel respondent to be a witness against himself or violate respondent's rights under *Miranda*. Accordingly, there is no reason to suppress any portion of the videotape of those proceedings.[6]

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[6] Respondent was not in custody (nor was he compelled to make any statements) while he performed the field sobriety tests on the side of the road. See *Pennsylvania* v. *Bruder*, 109 S. Ct. 205, 207 (1988); *Berkemer* v. *McCarty*, 468 U.S. 420, 442 (1984). Since *Miranda* requires that the police advise suspects of their constitutional rights only in circumstances of custodial interrogation, the officer who stopped respondent was not required to warn respondent before questioning him and asking him to perform the sobriety tests. Therefore, the testimony relating to the results of the field tests and the statements respondent

1. *The Booking Questions*. The police did not err by booking respondent without advising him of his constitutional rights. Although booking consists of questioning that occurs while the suspect is in custody, it does not constitute "custodial interrogation" as that term was used by this Court in *Miranda*. The *Miranda* Court was concerned with police interrogation that was often intensive and lengthy, and that was designed to elicit admissions of guilt. 384 U.S. at 481. The booking process is neither coercive nor lengthy, nor is it part of the investigative effort. Instead, it is a form of administrative processing that consists mainly of obtaining information "required immediately to enable the police to book and arraign the suspect and to permit the magistrate to determine the amount of bail to be fixed and whether persons claiming to be relatives should be allowed to confer with the suspect." *United States ex rel. Hines* v. *LaVallee*, 521 F.2d 1109, 1112 (2d Cir. 1975), cert. denied, 423 U.S. 1090 (1976).

In *Rhode Island* v. *Innis*, 446 U.S. 291 (1980), the Court indicated that the police are not required to advise suspects of their *Miranda* rights before asking them routine booking questions. In that case, the Court defined "interrogation" to exclude inquiries that are "normally attendant to arrest and custody." 446 U.S. at 301. See also *South Dakota* v. *Neville*, 459 U.S. 553, 564 n.15 (1983). In the wake of *Innis*, the courts of appeals have held that *Miranda* warnings are ordinarily not required before police ask routine booking questions. See, *e.g.*, *United States* v. *Horton*, 873 F.2d 180, 181 n.2 (8th Cir. 1989) ("[i]t is well established that *Miranda* does not apply to biographical data necessary to complete booking or pretrial services"; collecting cases); *Gladden* v. *Roach*, 864 F.2d 1196, 1198 (5th Cir.)

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made while taking them, including his admission that he was too inebriated to perform the tests satisfactorily, was properly admitted into evidence.

("biographical questions, which are part of the booking routine and are not intended to elicit damaging statements, are not interrogation for Fifth Amendment purposes"), cert. denied, 109 S. Ct. 3192 (1989); *United States* v. *Gotchis*, 803 F.2d 74, 79 (2d Cir. 1986) ("[r]outine questions about a suspect's identity and marital status, ordinarily innocent of any investigative purpose, do not pose the dangers *Miranda* was designed to check"); *United States* v. *Taylor*, 799 F.2d 126, 128 (4th Cir. 1986) (officers' questions about suspect's identity not barred by *Miranda* even though suspect had already invoked his right to counsel), cert. denied, 479 U.S. 1093 (1987); *Robinson* v. *Percy*, 738 F.2d 214, 219 (7th Cir. 1984) ("*Miranda* does not apply when officers ask a suspect routine processing questions."); *United States* v. *Avery*, 717 F.2d 1020, 1024-1025 (6th Cir. 1983), cert. denied, 466 U.S. 905 (1984); *United States* v. *Glen-Archila*, 677 F.2d 809, 815-816 (11th Cir.), cert. denied, 459 U.S. 874 (1982); *United States* v. *Booth*, 669 F.2d 1231, 1238 (9th Cir. 1981); see generally 1 W. LaFave & J. Israel, *Criminal Procedure* § 6.7(b), at 504-505 (1984).

Recognizing a "booking exception" to *Miranda* does not mean, of course, that any question asked during the booking process falls within that exception. Without obtaining a waiver of the suspect's *Miranda* rights, the police may not ask questions, even during booking, that are designed to elicit incriminatory admissions. In this case, for example once respondent was in custody the police could not ask him whether he had been drinking, unless he waived his right to remain silent. But respondent was not subjected to custodial interrogation of the sort that must be preceded by a waiver of his *Miranda* rights when he was asked his name, address, height, weight, eye color, date of birth, and

current age. Therefore, it was not error to admit evidence of respondent's answers.[7]

2. *The "Sixth Birthday" Question.* Asking respondent to calculate the date of his sixth birthday was not a routine booking question, but neither was it a question intended to elicit a testimonial response. Instead, it was a sobriety test designed to determine if respondent could perform simple arithmetic, just as the other sobriety tests were designed to determine if he could perform simple physical functions. In that respect, the "sixth birthday" question was like asking a suspect to count to 30 or to recite the alphabet, a commonly used field sobriety test. Because the police had no investigative interest in the date on which respondent turned six, but sought only to test how respondent was functioning at the time of his arrest, the "sixth birthday" question did not constitute custodial interrogation as this Court used that term in *Miranda*.

The fact that respondent was asked to make a verbal response to the "sixth birthday" question did not make that evidence testimonial. In *United States* v. *Wade*, 388 U.S. 218 (1967), the Court held that a suspect could be compelled to speak while in a line-up. The Court explained that "compelling Wade to speak within hearing distance of the witnesses, even to utter the words purportedly uttered by the robber, was not compulsion to utter statements of a

[7] Even if the Court concludes that routine booking questions constitute custodial interrogation and are therefore governed by *Miranda*, respondent's answers to those questions are nonetheless admissible in this case. Respondent's answers to the booking questions were offered into evidence not for their contents, but simply to demonstrate respondent's condition when he was being booked. For the reasons given in more detail in point 2, *Miranda* and the Fifth Amendment do not foreclose the admission of evidence that is offered for purposes other than "for the testimonial or communicative content of what was • • • said." *United States* v. *Dionisio*, 410 U.S. 1, 7 (1973).

'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.* at 222-223. See also *United States* v. *Dionisio*, 410 U.S. 1, 7 (1973) (rejecting the contention that the compelled production of a voice exemplar violates the Fifth Amendment); *Gilbert* v. *California*, 388 U.S. 263, 266 (1967) (compelled production of handwriting exemplar does not violate Fifth Amendment).

Like Wade, respondent was not asked to speak his guilt. The "sixth birthday" question was designed to produce a demonstration of respondent's degree of impairment, not to elicit an incriminating, testimonial response. Because the question did not call for an answer that could be incriminating due to its testimonial contents, the Fifth Amendment would not have prevented the Commonwealth from compelling respondent to respond to the question and using his failure to answer it against him at trial. See *Fisher* v. *United States*, 425 U.S. 391, 408 (1976) (Fifth Amendment "applies only when the accused is compelled to make a *testimonial* communication that is incriminating"). And because the Fifth Amendment would not prohibit the government from compelling respondent to answer the question, *Miranda*, which is designed to protect the suspect's Fifth Amendment rights, would not prohibit the government from asking that question in the course of custodial interrogation.[8]

[8] This Court's decision in *Estelle* v. *Smith*, 451 U.S. 454 (1981), provides a useful illustration of the difference between the use of verbal evidence for testimonial and demonstrative purposes. In *Smith*, the Court held that the State could not introduce evidence regarding the defendant's dangerousness where that evidence was based on a custodial psychiatric interview with the defendant that was not preceded by *Miranda* warnings. 451 U.S. at 461-469. The Court explained that the psychiatrist's testimony was inadmissible because his conclusions were not based simply on observations of the defendant, but were drawn

The Superior Court found that respondent's confused reaction to the "sixth birthday" question, like various statements he made while he was at the Booking Center, was testimonial because it "reveal[ed] his thought processes." Pet. App. B15; see *id.* at B14. The court relied particularly on its prior decision in *Commonwealth* v. *Conway*, *supra*, which noted that "confusion is arguably a sign of intoxication," and held that a defendant cannot be "forced to incriminate himself by 'communicating' his confusion while performing [sobriety] tests." 368 Pa. Super. at 498-499, 534 A.2d at 546.[9] But the fact that a suspect's confused thought processes communicate that he is drunk does not make his statements testimonial evidence. A statement or conduct is not "testimonial" simply because it can be said to reveal something about the workings of a person's mind. Slurred speech and the inability to walk a straight line or to read a few simple words all reveal something about the suspect's mental processes, but none of those demonstrations can be said to be testimonial. In order to be testimonial, "an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe* v. *United States*, 108 S. Ct. 2341, 2347 (1988). Respondent's inability to answer the "sixth birthday" question did not relate a factual assertion or disclose information to the government.[10] That evidence was therefore admissible at trial.

largely from the defendant's account of the crime during his interview, including the statements he made and the remarks he omitted in reciting the details of the crime. *Id.* at 464. The Fifth Amendment privilege—and thus the *Miranda* decision—were applicable, the Court held, "because the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." *Id.* at 465. The Court noted that the lower court, which had reached the same conclusion, had "doubted the applicability of the Fifth Amendment" if the psychiatrist's diagnosis "had been founded only on respondent's mannerisms, facial expressions, attention span, or speech patterns." *Id.* at 464 n.8, citing *Smith* v. *Estelle*, 602 F.2d 694, 704 (5th Cir. 1979).

[9] In *Commonwealth* v. *Thompson*, 377 Pa. Super. 598, 547 A.2d 1223 (1988), the court went beyond the decision here and suppressed a videotape of a sobriety test that showed that "the subject was obscene and uncooperative." 377 Pa. Super. at 606, 547 A.2d at 1227. Relying, like the court below, on *Conway*, the court reasoned that "obscenity and belligerence are just as indicative of an individual's thought processes as is confusion," and concluded that the tape was testimonial evidence for that reason. *Ibid.*

3. *The Sobriety Tests*. It is clear that the officers at the Booking Center were not required to advise respondent of his *Miranda* rights and obtain a waiver of those rights before administering sobriety tests and asking respondent to take a breath test. A breath test is indistinguishable from a blood test for Fifth Amendment purposes. It is no more communicative or testimonial than the blood test involved in *Schmerber*; if anything, it is a less intrusive method of obtaining evidence. Because taking a breath test does not implicate the Self-Incrimination Clause, this Court has noted that a police inquiry whether the suspect will take such a test "is not an interrogation within the meaning of *Miranda*." *South Dakota* v. *Neville*, 459 U.S. at 564 n.15.

For the same reason, the court below recognized that "no *Miranda* warnings were required" before respondent was asked to perform the sobriety tests. Pet. App. B10. As the

[10] Of course, respondent's conduct cannot be deemed "testimonial" on the ground that it "disclose[d]" the "information" that he was confused. Schmerber's blood test "disclosed" the information that he was legally drunk, Gilbert's handwriting exemplar "disclosed" that he had distinctive handwriting, and Dionisio's voice exemplar "disclosed" that he had a distinctive voice, but none was deemed testimonial. The "information" in each of those cases, as in this one, was an inference drawn by the finder of fact from demonstrative evidence, similar to the inference that would be drawn from a videotape showing the suspect staggering around the police station.

court explained, "[r]equiring a driver to perform physical tests or to take a breath analysis test does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial." *Id.* at B9 (quoting *Commonwealth* v. *Benson*, 280 Pa. Super. 20, 29, 421 A.2d 383, 387 (1980)). That is because "[f]ield sobriety tests • • • are not intended to reveal any thoughts or knowledge of the subject. • • • They only require him to exhibit his physical coordination, or lack thereof." *Commonwealth* v. *Brennan*, 386 Mass. 772, 779, 438 N.E.2d 60, 65 (1982).[11]

Nor does it matter that, to perform the sobriety tests, respondent had to cooperate with the police to some degree. In *Schmerber*, the Court noted that the lower courts had long held that suspects may be compelled "to assume a stance, to walk, or to make a particular gesture," 384 U.S. at 764, all of which require cooperation. This Court has held that suspects may be required to produce voice exemplars, *United States* v. *Dionisio*, 410 U.S. at 7, and handwriting exemplars, *Gilbert* v. *California*, 388 U.S. 263, 266 (1967). Both of those procedures require more cooperation than exhaling into a device that tests the blood alcohol level from the breath, and roughly the same degree of cooperation as the other sobriety tests that respondent performed.

The Commonwealth could, therefore, have compelled respondent to take the breath test or the other sobriety tests without obtaining a waiver of his *Miranda* rights; so, too, the Commonwealth could properly offer into evidence the results of those tests or the fact that respondent refused to

[11] Nor is there any difference, under the Fifth Amendment, between being asked to count to 30 while standing on one leg and performing sobriety tests like the horizontal gaze nystagmus test and the walk and turn test, which do not require the defendant to speak. As we have noted above, the fact that a defendant must speak does not make evidence testimonial.

take them. See *South Dakota* v. *Neville*, 459 U.S. at 563-564. If the results of the tests are admissible, there is no reason why the trier of fact should not be permitted to view a videotape of the defendant performing the tests and judge for itself whether the defendant appeared to be drunk.

4. *The Statements Made During the Sobriety Tests.* Finally, the statements respondent made while taking the sobriety tests and while being told about the provisions of Pennsylvania law should be admitted for two independent reasons. First, the administration of sobriety tests and the description of state law are not procedures "reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. at 301; see also *South Dakota* v. *Neville*, 459 U.S. at 564 n.15. Although a suspect may volunteer something incriminating while performing the sobriety tests or being told about the law, nothing in either procedure is designed or likely to provoke such a response. The statements respondent made during the sobriety tests and the explanation of the implied consent law were thus not the products of custodial interrogation. *Palmer* v. *State*, 604 P.2d at 1109.

In this respect, the lower court was clearly in error. It failed to recognize that, for a statement to be within *Miranda*'s reach, it must be the product of questioning. Aside from the routine booking questions and the question regarding respondent's sixth birthday, discussed above, respondent was not questioned during the administration of the sobriety tests or the explanation of the requirements of Pennsylvania law.[12] It was respondent who volunteered information and

[12] The question whether respondent understood Pennsylvania law obviously did not constitute "custodial interrogation" for purposes of *Miranda*, since the question was asked simply to ensure that the terms of the law had been adequately explained to respondent, not to obtain an incriminating admission from him. See *South Dakota* v. *Neville*, 459 U.S. at 555 n.2, 564 n.15; *United States* v. *Emery*, 682 F.2d 493, 501 (5th Cir.), cert. denied, 459 U.S. 1044 (1982).

asked questions that he subsequently sought to exclude from evidence. *Miranda* simply does not reach such volunteered statements that are not the product of custodial police interrogation.

In any event, none of respondent's videotaped statements consisted of incriminating admissions.[13] The videotape was entered into evidence not to prove the truth of anything respondent said, either during booking or later, but because respondent's speech patterns and his difficulty in responding to the questions showed that he was drunk. The court below recognized that fact, as it concluded that respondent's videotaped responses were prejudicial in part because they "led the finder of fact to infer that [respondent's] • • • failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." Pet. App. B17-B18. The fact that it did not matter what respondent said, but how he said it, proves that the audio portion of the tape is demonstrative evidence, not testimonial evidence.

There is no doubt that the police officers who booked respondent and administered the tests could testify that his manner of speech indicated that he was drunk. Because the videotape was offered for precisely the same reason, it should be equally admissible. If the police officers may testify about their observations of respondent's condition, as they surely may, the trier of fact should be allowed to see and hear a videotape of the suspect's actual performance at the time and reach its own conclusion as to his condition.[14] The Superior Court therefore should not have ordered that evidence excluded.

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[13] While he was on the side of the road, respondent told the police officer that he was too drunk to perform the field sobriety tests. Pet. App. B4. On the videotape, however, respondent "gave no incriminating statement." *Id.* at C6.

[14] In a case such as this, where the defendant speaks English as a second language, defense counsel might well contend that the booking officer misinterpreted the defendant's difficulty speaking and comprehending English for evidence that he was drunk. A trier of fact would best be able to resolve such a dispute by watching and listening to the videotape of the booking and testing procedures.

CONCLUSION

The judgment of the Superior Court of Pennsylvania should be reversed.

Respectfully submitted.

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NOVEMBER 1989

U.S. GOVERNMENT PRINTING OFFICE 1989 — 262 203/00629